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When a writing is accepted for publication, a copy of the edited manuscript will generally be provided to the author for prepublication approval. However, minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, neither galley proofs nor page proofs are provided to authors.

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PROFESSIONAL WRITING AWARD FOR 1984

Each year, the Alumni Association of The Judge Advocate General's School presents an award to the author of the best article published in the *Military Law Review* during the preceding calendar year. The purposes of the award are to recognize outstanding scholarly achievements in military legal writing and to encourage further writing.

The award was first given in 1963, the sixth year of the *Review*'s existence. The award consists of a citation signed by The Judge Advocate General and an engraved plaque. Selection of the winning award is based upon the article's long-term value as an addition to military legal literature, its usefulness to judge advocates in the field, and the quality of its writing, organization, analysis, and research.

The award for 1984 was presented to Major Thomas Frank England, JAGC, U.S. Army, for his article entitled, "The Active Guard/Reserve Program: A New Military Personnel Status," which appeared in volume 106, the fall 1984 issue of the *Military Law Review*. Major England, currently serving as the Officer-in-Charge of the Heilbronn Branch Office of the Office of the Staff Judge Advocate, VII Corps, Federal Republic of Germany, prepared the article as a thesis in partial fulfillment of the requirements of the 32d Judge Advocate Officer Graduate Course, 1983-84.

In the award-winning article, Major England first surveyed the history and purpose of the creation of the Active Guard/Reserve Program. In an exhaustive analysis of the personnel status of the AGR service member, Major England studied the administrative and criminal law implications of the creation of the program. In conclusion, Major England proposed specific changes to the Manual for Courts-Martial that would fully implement the criminal law jurisdiction over the AGR service member afforded by Article 3(a) of the Uniform Code of Military Justice.

With deep satisfaction, the *Military Law Review* congratulates Major England in his achievement. His excellent work has helped earn the respect of the military legal community for the *Review*, The Judge Advocate General's School, and the Judge Advocate General's Corps. It is hoped that others will be encouraged to emulate his efforts in producing this fine work of legal scholarship.

THE GRENADA INTERVENTION: A LEGAL ANALYSIS

by Major Ronald M. Riggs*

I. FACTS

A. INTRODUCTION

On the morning of October 25, 1983, elements of a combined Caribbean and United States security force landed on the beaches south of Pearls Airport and parachuted onto the Point Salines Airport of the island of Grenada. The force was comprised of units from the United States, Barbados, Jamaica, and four member states of the Organization of Eastern Caribbean States (OECS).[1]

By October 28, all significant military objectives had been secured with minimal casualties to all parties; this was a primary goal of the security force. United States' casualties were 18 killed in action and 116 wounded in action. Grenadian casualties were 45 killed and 337 wounded. Twenty-four of the Grenadian dead were civilians, 21 of whom were killed in an unfortunate bombing of a mental hospital located adjacent to an anti-aircraft installation. Twenty-four Cubans were killed and 59 wounded of the approximately 800 Cuban "construction workers" on the island. Five hundred ninety-five American citizens were, at their request, evacuated from the island.[2]

By November 9, all Cubans (except two diplomats), 17 Libyans, 15 North Koreans, 49 Soviets, 10 East Germans, and 3 Bulgarians had

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[1]Dep't of State & Dep't of Defense, Grenada, A Preliminary Report 1 (1983) [hereinafter cited as DOS/DOD].

[2]*Id.*

left the island. One of the two Cuban diplomats was declared *persona non grata* on November 23 and also departed Grenada.[3]

By December 15, all American combat forces had withdrawn, leaving behind only training, military police, medical, and support personnel.[4]

President Reagan's decision in favor of United States participation in this action was based on three grounds. First, the Governor General of Grenada, Sir Paul Scoon, through a confidential channel, had transmitted an appeal to the OECS and other regional states to restore order on Grenada. United States assistance was sought in this request. Second, the OECS concluded that the situation in Grenada was a threat to peace in the region, and, under their collective defense treaty, action was needed. United States assistance, together with assistance from Barbados and Jamaica, was requested. Finally, there were on the island approximately 1,000 United States nationals, whose security was thought to be in such jeopardy that immediate action was required.[5]

This article will examine the facts leading up to the Grenada action, analyze the applicable international law, and compare this action to the 1979 Soviet intervention in Afghanistan.

B. BACKGROUND

Grenada is a small island nation, about twice the size of the District of Columbia. It has a population of about 110,000.[6]

On February 7, 1974, Grenada became an independent member of the British Commonwealth.[7] At independence, Grenada adopted a Constitution on the model of the British Commonwealth system, providing for, among other things, a Governor-General. Article 57 of the Constitution provides:

> (1) The executive authority of Grenada is vested in Her Majesty.

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[3]*Id.*

[4]*Id.*

[5]*Id. See also* Address by Deputy Secretary of State Kenneth W. Dam before the Associated Press Managing Editors' Conference (Nov. 4, 1983) (published as *The Larger Importance of Grenada*, Dep't of State, Bureau of Public Affairs, Current Policy No. 526) [hereinafter cited as Dam, Nov. 4]; Statement by Assistant Secretary of State for Inter-American Affairs Langhorne A. Motley before the House Armed Serv. Comm., 98th Cong., 1st Sess. (1984) (published as *The Decision to Assist Grenada*, Dep't of State, Bureau of Public Affairs, Current Policy No. 541) [hereinafter cited as Motley, Jan. 24].

[6]Dep't of State, Bureau of Public Affairs, Grenada, Background Notes (1980).

[7]*Id.*

> (2) Subject to the provisions of this Constitution, the executive authority of Grenada may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.[8]

Like Great Britain, the functionary responsibilities of government rest with the Prime Minister. Eric Gairy was the first Prime Minister of Grenada.[9]

After Grenada became independent, a coalition of opposition parties, including the New Jewel Movement of Maurice Bishop, mounted a serious challenge to Eric Gairy, receiving forty-eight percent of the vote in the 1976 elections. However, the eccentric Gairy, popular with the lower income people in Grenada, remained in control.[10]

On March 13, 1979, elements of the New Jewel Movement took advantage of Gairy's absence from the country and carried out a *coup d'etat*. Fifty to sixty New Jewel Movement supporters seized the defense force barracks and the island's radio station. There was little resistance to the *coup*. Maurice Bishop was named Prime Minister of the new "Peoples Revolutionary Government." On March 25, 1979, Bishop suspended the 1974 Constitution, declaring that it would be replaced pending revision with a series of "People's laws."[11] Grenada maintained its membership in the British Commonwealth and retained the Governor-General, although his functions were more narrowly confined.[12]

The New Jewel movement started as an eclectic mixture of West Indian, Tanzanian, Marxist and nationalist ideology. It emphasized village assemblies and grassroots agriculture developments.[13] As such, it enjoyed an initial base of popular support.[14]

Once in power, however, the government was, through its ties

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[8]Const. of Grenada art. 57, *reprinted in* Grenada, Constitutions of the World (A. Blaustein & B. Glanz eds. 1974).

[9]DOS/DOD, *supra* note 1, at 7.

[10]*Id.* A large measure of Gairy's power, however, was gained through intimidation and outright fraud in elections. Gairy controlled a 50-member group called the "mongoose gang" that aided him in forcibly exercising political control. This and other increasingly erractic behavior cost him much of his grass-roots support.

[11]DOS/DOD, *supra* note 1, at 7

[12]Moore, *Grenada and the International Double Standard*, 78 Am. J. Int'l L. 145, 160 (1984).

[13]DOS/DOD, *supra* note 1, at 7.

[14]Moore, *supra* note 12, at 145.

with the Soviet Union and Cuba, transformed. Within three days of the *coup*, a Cuban ship carrying Soviet weapons and ammunition arrived in Grenada.[15] By 1983, Grenada had:

—A Marxist-Leninist ruling party, complete with Central Committee and Politburo;

—An army and militia that outstripped the combined forces of all of its OECS neighbors and provided an important vehicle for indoctrinating youth;

—A highly developed propaganda machine that relied on government-monopolized media, and party-controlled entities throughout the society;

—An array of mass organizations designed to compel support for the regime in all sectors of the society; and

—An internal security apparatus that dealt harshly with critics.[16]

C. HUMAN RIGHTS UNDER BISHOP

Human rights began to deteriorate with the suspension of the 1974 Constitution after the *coup*.[17] Public reaction to government abuses was muted because of the government's control over the mass media and because of the ruthless imprisonment or exile of political opponents. Elections were indefinitely suspended. Grenada refused to permit inspection of its prisons by the International Committee of the Red Cross.[18]

A 1982 report of the U.S. State Department related:

> The overthrow of the Gairy regime established Grenada as having the first nonconstitutional change of government in the commonwealth Caribbean . . . . Prime Minister Bishop has justified the continued detention of political prisoners by arguing that "every revolution creates dislocations". . .. There is physical evidence that prisoners have been abused during detention. Physical scarring would appear to substantiate their claim of having been burned by cigarettes and tortured with electric cattle prods. . ..[19]

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[15]*D-Day in Grenada*, Time, Nov. 7, 1983, at 26 [hereinafter cited as Time].
[16]DOS/DOD, *supra* note 1, at 8.
[17]*Id.* at 15.
[18]*Id. See generally* Amnesty Int'l, Amnesty International Report 1982, at 138-39, 353 (1982).
[19]Dept. of State, Country Reports on Human Rights Practices for 1982 (1982).

When the 1974 Constitution was suspended, the People's Revolutionary Government empowered itself to arrest persons without warrant for suspected counter-revolutionary activities. A 1980 law established a tribunal to review preventive detention cases; however, the tribunal did not meet as scheduled. Additionally, because the law did not compel the government to initiate charges, political detainees could be held indefinitely without formal charges. Preventive detention orders were issued in lieu of arrest warrants.[20] The justification for detention was provided in a preprinted clause which stated simply that the accused was "reasonably suspected of counseling and conspiring with other persons to take action of such a nature that was likely to endanger public safety, public order or the defense of Grenada or to subvert or sabotage the People's Revolutionary Government."[21] The orders also contained a nebulous provision providing that the accused "be detained in such place and under such conditions as I may from time to time direct" and often were signed by Bishop as "Minister of National Security."[22]

As of July 1983, the People's Revolutionary Government was holding 103 Grenadians, or roughly one out of every 1,000 members of the populace, as political prisoners.[23] One of those was Jerry Romaine, a former manager of Radio Grenada. He spent four years in Richmond Hill Prison before his release by the combined security forces. He estimated that 1,000 Grenadians were held as political prisoners at one time or another during the four years of the Bishop regime. "Their ranks included politicians, journalists, labor union leaders, government officials, a surprisingly large number of disenchanted members of the ruling New Jewel Movement, and anyone else considered a threat."[24]

Antonio Langdon is a Grenadian with permanent legal residence in the United States. He was arrested by the Bishop regime while on a visit to Grenada. Following his release, again by the combined security forces, he stated that it was over a year before he was given a reason for his arrest. The reason given was that he had made remarks critical of the "revolution" while still in Brooklyn. On May 7, 1980, a prison guard shot Langdon three times at close range with a Soviet AK-47 assault rifle. As a result, Langdon is badly scarred and his left arm is paralyzed. Mr. Langdon also stated that he was

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[20]DOS/DOD, *supra* note 1, at 15.
[21]*Id.* at 14.
[22]*Id.* at 14-15.
[23]*Id.* at 17.
[24]*Id.*

beaten and tortured, at least once by insertion of steel rods into his upper back. This operation was carried out under the supervision of a Cuban "neurologist."[25]

These tales of abuses of human rights were typical of the Bishop regime. Following Bishop's murder, the situation further deteriorated. Reaction to the murder included the closing down of the airport, interference with telephone and telex lines, a 24-hour shoot-on-sight curfew, and the arrest of Alister Hughes, the only independent Grenadian journalist with international standing.[26]

D. THE MILITARY BUILDUP

When the New Jewel Movement seized power in 1979, Grenada was maintaining a British-style constabulary and small, lightly-armed defense force. By October 25, 1983, Grenada possessed a regular army of 600 Cuban-trained soldiers, supplemented with a reserve of between 2,500 and 2,800 militiamen.[27]

Although its forces were larger than the combined forces of the OECS, Grenada was planning to field three more active battalions and nine more reserve battalions. The proposal would have given Grenada an 18 battalion force of between 7,200 and 10,000 soldiers. Per capita, this would have given Grenada one of the largest military forces of any country in the world.[28]

Equipping and training these forces was to be accomplished with the aid of the communist bloc countries. Documents found in the joint security mission show that in the last three years Grenada signed at least five military assistance agreements; three with the Soviet Union, one with Cuba, and one with North Korea. All were, by their terms, to be kept secret from the rest of the world.[29]

Taken together, the agreements provide for delivery by 1986 of:

—About 10,000 assault and other rifles, including Soviet AK-47s, Czech M-52/57s, sniper rifles and carbines;
—More than 450 submachine and machine guns;
—More than 11.5 million rounds of 7.62mm ammunition;
—294 portable rocket launchers with more than 16,000 rockets;

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[25] *Id.*
[26] *Id.*
[27] *Id.* at 18.
[28] *Id.* at 20.
[29] *Id.*

—84 82mm mortars with more than 4,800 mortar shells;
—12 75mm cannon with some 600 cannon shells;
—60 crew-served anti-aircraft guns of various sizes, with almost 600,000 rounds of ammunition;
—15,000 hand grenades;
—7,000 land mines;
—30 76 mm ZIS-3 field guns with almost 11,000 rounds of ammunition;
—30 57mm ZIS-2 anti-tank guns with about 10,000 rounds of ammunition;
—50 GRAD-P launchers with 1,800 122mm projectiles;
—60 armored personnel carriers and patrol vehicles;
—86 other vehicles and earthmovers;
—4 coastal patrol boats;
—156 radio stations [military communications equipment];
—More than 20,000 sets of uniforms; and
—Tents capable of sheltering more than 5,000 persons.[30]

This list includes enough armament to outfit a force of 10,000, half of whom are in the field.[31]

Training was primarily the responsibility of the Cubans. By agreement, they were to provide permanent cadre and temporary specialists to assist the Grenadian forces. The Soviets were also by agreement committed to provide training in tactics and military intelligence for senior officers.[32]

These agreements were being implemented at the time of the joint security mission. Cuban construction workers, other paramilitary personnel, and regular military forces in Grenada outnumbered the total active strength of the Grenadian Army. Cuban advisors held positions in all key government ministries.[33]

E. GRENADA'S RELATIONSHIP WITH THE UNITED STATES

After the 1979 New Jewel Movement *coup*, President Jimmy Carter warned Prime Minister Bishop that his government could expect no more economic aid from the United States if it aligned itself

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[30] *Id.* at 20-21
[31] *Id.*
[32] *Id.* at 22-23
[33] *Id.* at 27.

with Cuba. Bishop protested this "interference" by the United States. Covert action to dislodge Bishop was considered, but the President instead decided to treat Bishop with what was termed "hands-off hostility."[34]

When Bishop announced in November 1979 that Fidel Castro would help Grenada build a new international airport at Port Salines, relations with the United States further deteriorated. In December 1979, a Cuban construction brigade with 85 pieces of Soviet heavy construction equipment arrived to start work on the new 10,000-foot runway, compatible for both tourist jumbo jets and long-range military aircrafts.[35]

In 1981, Bishop was told by the new Reagan Administration that his ties with Cuba posed a threat to peace in the region. Grenada's links with the Kremlin grew more open as relations with the United States worsened. Deputy Prime Minister Bernard Coard visited Moscow in May 1980 and signed a treaty giving the Soviets permission to land long range reconnaissance planes on the yet-to-be-completed runway.[36]

In April 1982, President Reagan visited Barbados. While there, he complained to Prime Minister Tom Adams of Barbados and Prime Minister Edward Seaga of Jamaica about the "spread of the virus" of communism from Grenada. The concern of the President was shared by the two Prime Ministers. That concern grew when, in July 1982, Prime Minister Bishop stated that the Soviet Union had granted Grenada long-term financial credits to construct a land station linked to a Soviet communications satellite.[37]

In March 1983, President Reagan commented on the situation in Grenada, the world's leading producer of nutmeg. He stated: "It isn't nutmeg that's at stake in the Caribbean and Central America. It is the U.S. national security." Two weeks later, in a speech for television, the President showed a previously classified photograph of Cuban barracks and the growing air strip at Point Salines, Grenada. The President commented that "Grenada doesn't even have an air force. Who is this intended for? The Soviet-Cuban militarization of Grenada can only be seen as power projection into the region."[38]

In the summer of 1983, Prime Minister Bishop became increasingly

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[34]Time, *supra* note 15, at 26.
[35]*Id.*
[36]*Id.*
[37]*Id.*
[38]*Id.* at 27.

concerned about his growing dependence on the Soviet Union and Cuba. In June, Bishop made an uninvited trip to Washington to improve relations.[39] After a week of cool reception from the administration, Bishop met with National Security Advisor William Clark and Deputy Secretary of State Kenneth W. Dam.[40] They told Bishop that the first step to improve relations would be to stop "what was quite a campaign of attacks on the United States."[41]

Upon his return to Grenada, Bishop told colleagues in the New Jewel Movement that he wanted to test Washington's intentions. He toned down the "campaign of attacks" and spoke of opening a dialogue with the United States.[42]

F. FINAL BREAKDOWN OF AUTHORITY

The turn toward the United States created sharp conflict between Bishop and more leftist elements in the government of Grenada. In the months of August and September, Deputy Prime Minister Bernard Coard led an attack on Bishop's authority in the government.[43] These attacks culminated on October 12, 1983, when the Central Committee of the Communist Party of Grenada apparently voted to place Bishop under house arrest.[44] An announcement was made that Coard, who on October 12 resigned from the post of Deputy Prime Minister, would succeed Bishop as Prime Minister. Coard, however, neither made a public statement nor was seen until he was discovered in hiding by the joint security forces.[45]

On October 14, 1983, Bishop was informed that he was expelled from the Party and was taken into custody.[46] On October 18, after five days of efforts to achieve a compromise, five ministers loyal to Bishop resigned from the government. One of them, Unison Whiteman, stated that "Comrade Coard, who is now running in Grenada, has refused to engage in serious talks to resolve the crisis . . . it became clear to us that they did not want a settlement

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[39]Statement by Deputy Secretary of State Kenneth W. Dam Before the Comm. on Foreign Relations, U.S. Senate, 98th Cong., 1st Sess. 12 (1983) [hereinafter cited as Dam].

[40]Time, *supra* note 15, at 27.

[41]Dam, *supra* note 39, at 12.

[42]Time, *supra* note 15, at 27.

[43]DOS/DOD, *supra* note 1, at 31; Time, *supra* note 15, at 27; Dam, *supra* note 39, at 12.

[44]DOS/DOD, *supra* note 1, at 34-35.

[45]*Id.* at 35.

[46]Dam, *supra* note 39, at 3.

and seemed determined to use force and provoke violence to achieve their objective."[47] That day, there were demonstrations by school children for Bishop's return to office.[48]

On October 19, stores were closed. A crowd of several thousand, apparantly led by Unison Whiteman, freed Bishop and former Education Minister Jacqueline Creft from Bishop's home. They proceeded to the Grenadian Army's headquarters, Fort Rupert, where other Bishop loyalists were believed to be held. The crowd disarmed the garrison and Bishop took over the fort's central office. A few hours later, troops of the People's Revolutionary Army, some in armored personnel carriers, arrived at the fort. They opened fire, killing at least 18 and wounding at least 30 more, including women and children. Bishop, Creft, Whiteman, and three others were taken into the fort's courtyard and executed. Creft was reportedly beaten to death.[49]

The People's Revolutionary Army announced Bishop's death and declared the dissolution of the government. They further declared the formation of a 16-member military revolutionary council, of which army commander General Hudson Austin was the "nominal

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[47]DOS/DOD, *supra* note 1, at 36.

[48]*Id.*

[49]DOS/DOD, *supra* note 1, at 36; Time, *supra* note 15, at 27; Dam, *supra* note 39, at 3-4. General Hudson Austin, the Peoples Revolutionary Army Commander, gave a different account of the death of Prime Minister Bishop to the Vice Chancellor of the St. George's University School of Medicine, Dr. Geoffrey Bourne, on the day following Bishop's death. Austin claimed that the troops guarding Bishop's house were under strict orders not to fire at civilians if any attempt was made to liberate Bishop. If any civilian was killed or injured by a soldier, the offending soldier was to be punished. The same order was issued to the troops at Fort Rupert. This, Austin claimed, was the reason that Bishop's supporters had so little difficulty in disarming both groups of troops. When Fort Rupert was taken by the Bishop supporters, the commander of the fort called General Austin to tell him of the serious situation that had developed there. General Austin said that he had a special concern about the room full of explosives, located at the fort, that were intended for the airport construction project. General Austin stated that a carelessly thrown cigarette or a stray shot could have blown up the fort and possibly damaged the adjacent hospital. General thus felt that it was necessary to send military reinforcements at once. These reinforcements were led by an armored personnel carrier, with the officer in charge standing up in the vehicle. According to Austin, as the vehicle rounded a corner, a civilian shot the officer dead. The personnel carrier returned fire and blasted the wall of the council room of the fort in which Bishop and his cabinet had gathered. It was this blast that allegedly killed Bishop and his cabinet. The situation then deteriorated and a number of people were killed. Austin claimed to have lost three of his best officers in the incident. This account is in contrast to those of a number of eyewitnesses to the incident. They claim to have seen Bishop and the other members of his cabinet who were with him lined up against a wall and executed. Statement of Dr. Geoffrey Bourne, Vice Chancellor, St. George's University School of Medicine, *Hearings Before the Subcomm. on Int'l Security and Scientific Affairs and on Western Hemisphere Affairs of the House Comm.* on Foreign Affairs 188-89 (1983) [hereinafter cited as House Hearings Grenada].

head."[50] The term nominal head was used by U.S. Deputy Secretary of State Kenneth W. Dam because

> it was never clear that Austin or any other coherent group was in fact in charge. The RMC [revolutionary military council] indicated no intention to function as a new government. RMC members indicated only that a new government would be announced in 10 days or 2 weeks.
>
> It cannot be said whether or when some governmental authority would have been instituted. Former Deputy Prime Minister Coard, who had resigned on October 12, was reported under army protection, whether for his own safety or as a kind of detention was not clear.[51]

On the night of October 19, an official proclamation announced a shoot-on-sight, 24-hour-a-day curfew, to last until October 24 at 6:00 a.m. Pearls Airport was closed to all flights. Another Bishop supporter, Agriculture Minister George Louison, was arrested. International journalists were forced to immediately depart the country. Alister Hughes, a Grenadian journalist and the only independent reporter filing on-the-spot reports of Bishop's rescue from house arrest and later of his execution, was immediately arrested after Bishop's murder.[52]

On October 21, the curfew was lifted from 10:00 a.m. until 2:00 p.m. to allow people to obtain food. Looting and rioting occurred.[53]

Out of concern for the approximately 1,000 United States citizens on the island, diplomats from the United States Embassy in Barbados attempted to travel to Grenada on October 19. Because of the closing of the airport, they were turned back. On October 22, two diplomats were finally permitted to land on Grenada. They were met by teenage youths carrying machine guns. The next day, they met with a Grenadian representative, but proposals for evacuation of American and British nationals were rejected as unnecessary. That day, two more United States diplomats arrived.[54] After further discussions with the Grenadians, the diplomats concluded that evacuation was being stalled and that the American citizens on Grenada were in very real danger. They also concluded that the only way to guarantee the security of American citizens on Grenada was

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[50]*Id.*
[51]Dam, *supra* note 39, at 4.
[52]*See supra* note 49.
[53]Dam, *supra* note 39, at 4.
[54]DOS/DOD, *supra* note 1, at 37; Dam, *supra* note 39, at 5.

through a military rescue operation.[55] A subsequent bipartisan fourteen-member U.S. Congressional fact-finding mission to Grenada, confirmed the conclusion of the diplomats.[56] One member of the fact-finding mission, representative William S. Broomfield, ranking minority member of the House Foreign Affairs Committee, later wrote:

> I am absolutely convinced that had the United States not intervened, inaction would have been comparable to playing Russian roulette with the lives of more than 1,000 Americans on the island. As Rep. Tom Foley, chairman of the delegation has said, the President did not have the luxury of waiting a week to see how things developed before making a decision. "Waiting a week was a decision," he said. There is no doubt in my mind that the President would have been irresponsible had he risked so many American lives by delay.
>
> Every student, every American and every Grenadian except two former ministers of the Maurice Bishop Cabinet confirmed the danger faced by the students. There were gun emplacements around their campus. There was anarchy. There were revoluntionary soldiers firing weapons in the streets. There was anger, hatred and fear everywhere.
>
> Second, it is clear from what the embassy officials told the delegation that every attempt was made to extract the students prior to the intervention, but those attempts were met by a persistently hardening opposition on the part of the revolutionaries. The State Department was prepared to bring in a commercial cruise ship, Pan American aircraft, military aircraft, charter aircraft, civilian boats and military boats to get the students out, but all of these avenues were rejected by Revolutionary Military Council official Leon Cornwell.[57].

In addition, documents that were found by the joint security force indicated that some consideration had been given by the Grenadians

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[55]Time, *supra* note 15, at 27; Statement by Deputy Secretary of State Kenneth W. Dam Before the Comm. on Foreign Affairs, U.S. House of Representatives, 98th Cong., 1st Sess. 8 (1983); Cheney, *What Bonker Missed*, Wash. Post, Nov. 14, 1983, at A17, col. 1; *U.S. Envoys Travelling to Grenada to Check on Safety of Americans*, N.Y. Times, Oct. 23, 1983, at 1, col. 5.

[56]Cheney, *supra* note 55.

[57]Broomfield, *The President Couldn't Wait*, Wash. Post, Nov. 14, 1983, at A17, cols. 3-4.

in power, in conjunction with their Cuban advisors, to seizing Americans as hostages.[58]

G. THE OECS REQUEST FOR ASSISTANCE

Grenada and six other Caribbean island nations had enjoyed close cultural and administrative ties. Antigua, Dominica, Grenada, Monserrat, St. Kitts-Nevis, Saint Lucia and Saint Vincent, and the Grenadines are all former British colonies. Because of their common political and cultural background and because of their small size, these nations have a common market, a common currency, a common judicial system, and some common diplomatic representations.[59] They are also state parties to the Organization of Eastern Caribbean States Charter which established the OECS on June 4, 1981.[60] Among the purposes of the organization is "Mutual Defense and Security."[61] In a meeting on October 21, 1983, the OECS resolved unanimously that the deterioration of conditions in Grenada required action under the Charter. Grenada, without an apparent government, was not invited to participate. Because of the small armed forces that the OECS possessed, smaller collectively than Grenada's, on the same day, the OECS nations requested assistance from the United States, Jamaica, and Barbados. The formal request was transmitted to the State Department on October 23, 1983 and in part cited "the current anarchic conditions, the serious violations of human rights and bloodshed that have occured and the consequent unprecedented threat to the peace and security of the region created by the vacuum of authority in Grenada."[62]

After consideration of the developments in Grenada and the OECS request, President Reagan concluded that to wait passively would probably entail even greater risks.[63] Before acting on the OECS request, the President sent Ambassador Frank McNeil to consult with the OECS and other regional leaders. On October 23, Ambassador McNeil met in Barbados with OECS Chairperson Eugenia Charles, Prime Minister John Adams of Barbados, and Prime Minister Edward Seaga of Jamaica. These Caribbean leaders were "unanimous in their conviction that the deteriorating conditions on Grenada were a

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[58]*U.S. Reports Evidence of Island Hostage Plan*, N.Y. Times, Oct. 28, 1983, at A14, col. 5.
[59]Moore, *supra* note 12, at 145.
[60]20 I.C.M. 1166 (1981).
[61]*Id.* art. 3, para. 2.
[62]Motley, Jan. 24, *supra* note 5, at 3.
[63]Dam, Nov. 4, *supra* note 5, at 5.

threat to the entire region that required immediate and forceful action. They strongly reiterated their appeal for U.S. assistance."[64]

Additionally, on October 23, 1983, the Governor-General of Grenada, Sir Paul Scoon addressed a letter to Prime Minister Adams of Barbados requesting assistance. That letter provided:

> Government House, St. Georges, Grenada,
>
> October 24, 1983
>
> Dear Prime Minister,
>
> You are aware that there is a vacuum of authority in Grenada following the killing of the prime minister and the subsequent serious violations of human rights and bloodshed. I am, therefore, seriously concerned over the lack of internal security in Grenada. Consequently I am requesting your help to assist me in establishing this grave and dangerous situation. It is my desire that a peacekeeping force should be established in Grenada to facilitate a rapid return to peace and tranquility and also a return to democratic rule. In this connection I am also seeking assistance from the United States, from Jamaica, and from the Organisation of Eastern Caribbean States through its current chairman, the Hon. Eugenia Charles, in the spirit of the treaty establishing that organisation to which my country is a signatory.
>
> I have the honour to be
>
> (Signed)
>
> Sir Paul Scoon, Governor-General[65]

Ambassador McNeil's report on the consensus of the Caribbean leaders and Governor-General Scoon's request were conveyed to President Reagan and his advisors. On the evening of October 24, after informing the British Government and the congressional leadership that immediate military action was necessary, President Reagan finally approved United States participation in the operation.[66]

In working with the OECS, the United States was of the opinion that they were coordinating with the appropriate regional organization. Because of concern for the security of American citizens and

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[64]*Id.*
[65]Motley, Jan. 24, *supra* note 5, at 4.
[66]*Id.* at 2.

for success of the operation, the government refrained from informing the Organization of American States and the United Nations of the decision to take action. The Soviet Union and Cuba were not notified until the morning of the operation to prevent their interference with its success.[67]

The Grenadian people were overwhelmingly in support of the joint security mission. The *New York Times* reported the following results of a public opinion poll conducted by CBS News:

> Ninety-one percent of those polled said they were "glad the United States troops came to Grenada," while only 8 percent said they wished they had never come. A similar majority of 85 percent said they felt they or their family were in danger while General Austin was in power, while 11 percent said they were not . . . .
>
> The Grenadians' attitudes toward the Cubans were strongly hostile. Seventy-six percent said they believed Cuba wanted to take control of the Grenadian Government, and 65 percent said they believed the airport was being built for Cuban and Soviet military purposes . . . .
>
> Eighty-five percent said they felt the American purpose in invading was to "free the people of Grenada from the Cubans," and 81 percent said American troops were "courteous and considerate."
>
> A smaller share of those interviewed, 62 percent, said they felt the American troops had come "to save the lives of Americans living here." But only 21 percent said they believed that the troops had been sent "for the United States own military purposes rather than to help the people of Grenada."[68]

II. LEGAL THEORIES

Intervention into the affairs of another state is *prima facie* illegal under international law.[69] There are, however, certain exceptions to this basic rule of international order. Four recognized theories will

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[67] *Id.*

[68] *Grenadians Welcomed Invasion*, A Poll Finds, N.Y. Times, Nov. 6, 1983, at 21, cols. 1-6.

[69] J. Brierly, The Law of Nations 402 (6th ed. 1963); G. VonGlahn, Law Among Nations 162 (3d ed. 1976); Donnelly, *Humanitarian Intervention*, 37 J. Int'l Affairs 311, 311 n.2 (1984).

be analyzed in this article and related to the Grenada intervention. The first is intervention to protect nationals of the intervening state, when the state in which these nationals are located is unwilling or unable to protect the first state's nationals.[70] As stated in the facts, this was one of the three legal bases given by the United States government for its participation in the Grenada intervention. A second related theory is humanitarian intervention, or intervention to protect nationals of other states than those nationals of the intervening state. The third theory examined is often not considered intervention at all. It, too, forms a part of the United States government's justification for participation in the Grenada intervention.[71] That theory is that the purpose of the joint peacekeeping force was that of regional peacekeeping authorized under the United Nations Charter provisions dealing with Regional Organizations. The last theory analyzed is that of collective self-defense. More specifically, the doctrine of anticipatory self-defense will be examined as it related to the factual context of the Grenada intervention.

III. INTERVENTION TO PROTECT NATIONALS

A. INTRODUCTION

The focus of this section is on the legality of intervention by a state to protect its nationals in another state, when the latter state is unable or unwilling to protect them. This theory is often considered as a sub-theory of humanitarian intervention,[72] which will be discussed more thoroughly in the following section.

Prior to the United Nations Charter of 1945, customary international law generally recognized a right of intervention to protect nationals.[73] The current state of the law and its applicability to the Grenada intervention will be examined by discussing examples of post-Charter intervention cases and by analyzing the major theories of the law of intervention to protect nationals.

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[70]Brierly, *supra* note 69.

[71]*See supra* note 5 & accompanying text.

[72]*See generally* Lillich, *Forceable Self-Help by States to Protect Human Rights*, 53 Iowa L. Rev. 352 (1973); Reisman, *Humanitarian Intervention to Protect the Ibos*, in Humanitarian Intervention and the United Nations 167 (R. Lillich ed. 1973).

[73]D. Bowett, Self Defense in International Law 87 (1958); 1 L. Oppenheim, International Law § 135, at 309 (8th ed. H. Lauterpacht 1955).

B. THE CORFU CHANNEL CASE

The Corfu Channel case[74] is the major post-Charter decision of the International Court of Justice (I.C.J.) dealing with the legality of the unilateral use of force.

On May 15, 1946, Albanian shore batteries shelled two British warships passing through the North Corfu Channel of the Strait. Through an exchange of diplomatic correspondence, Great Britain asserted that a violation of its right of innocent passage through the Strait had occurred. Albania counter-claimed that foreign warships and merchant vessels did not have a right to pass through Albanian territorial waters without its permission. On October 22, 1946, Great Britain sent a squadron of warships through the Channel. The ships were at action stations, but their guns were not pointed at the coast. No prior authorization had been obtained from the Albanian government. The ships struck mines that had been laid in the channel. Two of the ships were damaged and over eighty sailors killed and wounded. Albania had made no attempt to warn the ships of the danger of the minefield. On November 12 and 13, 1946, British minesweepers, under the protection of numerous British warships, swept the channel of mines. Pursuant to a resolution of the United Nations Security Council, the case was submitted to the I.C.J. The court rendered three major holdings in the case. First, it ruled that Albania had a duty to warn of the danger of the minefield. In failing in this duty, Albania was liable to pay compensation to Great Britain. Second, the sending of British warships through the straits at action stations was an exercise of Great Britian's right of innocent passage which did not constitute a violation of Albanian sovereignty. Last, the court held the minesweeping operation to be illegal, but in so holding it did not cite it as in violation of the U.N. Charter, specifically Article 2(4), prohibiting the threat or use of force against the territorial integrity or political independence of a state.

Though the opinions of scholars interpreting the case differ,[75] this lack of reference to the Charter by the court has caused some to conclude that the court gave limited sanction to this type of forceable self-help. Professor McDougall stated: "Many states of the world have used force in situations short of the requirements of self-defense to protect their national interests. I think it can be said also

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[74]United Kingdom v. Albania, 1949 I.C.J. 4.

[75]*See* H. Lauterpacht, The Development of International Law by the International Court 90 (1958); McDougal, *Authority to Use Force on the High Seas*, Naval War Coll. Rev., Dec. 1967, at 19.

that the International Court of Justice has put its approval upon this practice [in the Corfu Channel Case]."[76]

Since the adoption of the U.N. Charter, there have been several major interventions by states to protect their nationals. The United States has participated in some of these interventions, including assistance in the Stanleyville rescue operation in the Congo in 1964 by Belgium, the Dominican Republic intervention in 1965, the *Mayaquez* rescue in 1975, and the unsuccessful attempt to free the American hostages held by Iran in 1980.[77]

The Congo Intervention in 1964 is particularly relevant to the Grenada intervention because of the similar factual situation.

C. THE CONGO INTERVENTION OF 1964

The 1964 intervention in the Congo by Belgium and the United States was the result of more than four years of political instability.[78] On July 30, 1960, Belgium granted the Democratic Republic of the Congo its independence. Because Belgium had not prepared the former colony for independence, the new government had immediate difficulties. Prime Minister Patrice Lumumba sought both administrative and military assistance from the United Nations; the United Nations agreed to provide both.[79]

By the end of 1962, a certain degree of stability had been attained but that period was followed by political repression in 1963. The chaotic political situation, coupled with a deteriorating economy, culminated in open rebellion in January 1964. By April, most of the countryside was controlled by guerillas. Because of financial difficulties, the United Nations forces present in the Congo were withdrawn on June 30, 1964, and, on that day, the ruling government resigned. Nine days later, Maurice Tshombe, at the request of President Kasamubu, formed a new government. As the rebellion intensified, Tshombe was provided supplies and air transport support from the United States. The government army was aided by

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[76]McDougal, *supra* note 75, at 29.

[77]Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality Under International Law*, 21 Va. J. Int'l L. 485, 503 (1981) [hereinafter cited as Note, Iran].

[78]L. Sohn, The Congo Question, The United Nations in Action, Ten Cases From United Nations Practice 222 (1968); Note, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, 12 Va. J. Int'l L. 261 (1972).

[79]Sohn, *supra* note 78, at 222-23.

mercenaries from South Africa, Rhodesia, and the Portugese provinces.[80]

In early August, the rebel Popular Liberation Army captured Stanleyville and Paulis. On September 5, Gbenye was proclaimed president of the Popular Revolutionary Government in Stanleyville. On that day, the Organization of African Unity met to discuss the growing crisis in the Congo and established a committee to help the government of the Democratic Republic of the Congo.[81]

On September 26, Gbenye announced that foreigners in Stanleyville would not be permitted to leave. His intent was to use them as hostages for political bargaining. Negotiations conducted by the United States, Belgium, and representatives of the OAU proved unsuccessful. On November 17, Gbenye announced that Dr. Paul Carlson, an American missionary, had been sentenced to death for espionage. At that time there were 63 Americans, 525 Belgians, 33 Canadians, 25 Britons, and about 200 Greeks and Italians in territory controlled by the rebels. The rebels "were truculently killing any Congolese belonging to civil political parties."[82]

On November 21, Tshombe sent a letter to U.S. Ambassador Godley in Kenya, authorizing the Belgian government to mount a rescue effort supported by United States transport aircraft. The mission commenced on November 24 and, by the end of November, all but 60 of the nearly 1,300 foreigners had been rescued.[83]

The significance of this example of intervention to protect nationals is that even the most conservative scholars do not condemn the Congo intervention as illegal.[84] The exceptional fact identical to the intervention in Grenada is that the intervention was at the behest of the government that was unable to protect the nationals of the intervening state.

D. THE IRANIAN HOSTAGE RESCUE MISSION

The most recent instance of intervention to protect nationals, prior to the Grenada intervention, was the United States' failed effort in

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[80]Note, Congo, *supra* note 78, at 261-63.
[81]*Id.*
[82]*Id.*
[83]*Id.*
[84]Brownlie, *Humanitarian Intervention*, in Law and Civil War in the Modern World 217, 221, 227 (J. Moore ed. 1974); Note, Iran, *supra* note 77, at 503.

April 1980 to rescue American hostages held at the American Embassy in Tehran.[85]

On November 4, 1979, several hundred armed Iranian students seized the U.S. Embassy in Tehran. Iranian government security forces had made no effort to prevent this seizure. The students demanded the return to Iran of the former Shah in exchange for the hostages' freedom. The United States government refused this demand and protested to Iranian Prime Minister Mehdi Bazargan. However, on November 5, the Bazargan government fell. Since the Ayatollah Khomeini had endorsed the militant's actions and demands, the acts of the militants became acts of the Iranian state.[86]

President Carter sent former Attorney General Ramsey Clark to Iran to negotiate; however, Khomeini refused to meet with Clark. Khomeini stated that Iran would not negotiate with the United States until the Shah was returned and until the United States gave up "espionage" against the Islamic movement.[87]

On November 9, the United States requested aid from the U.N. Security Council, which, in a resolution of December 9, called for the immediate release of the American hostages. In the meantime, the United States instituted legal action in the International Court of Justice seeking interim measures of protection for the hostages. On December 15, the I.C.J. issued a provisional order to that effect. The Iranian government, however, refused to comply with the court's order.[88]

The United States undertook additional measures, both through the Security Council and independently to no avail. On April 11, 1980, President Carter approved the rescue mission which was attempted on April 24. Due to equipment failure, the mission was not successful. Though Iran denounced the mission as an "act of war" and an invasion of their territory, it did not request a Security Council meeting to consider the legality of the rescue mission.[89]

The I.C.J. in its final opinion on the hostage crisis[90] was mildly critical of the disruptive effect of the rescue mission on the functioning of the court, but declined to rule on the legality of the mission.[91] The majority opinion termed the rescue mission as an "incursion"

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[85]Note, Iran, *supra* note 77, at 506-07.
[86]*Id.*
[87]*Id.*
[88]*Id.*
[89]*Id.*
[90]Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran) (Merits), 1980 I.C.J. 3; Note, Iran, *supra* note 77, at 507.
[91]United States v. Iran, 1980 I.C.J. at 43; Note, Iran, *supra* note 77, at 507.

into Iranian territory, rather than an invasion or even an intervention, terms used by Judge Morozov in his dissenting opinion. The absence of a characterization of the rescue mission as illegal has caused some commentators to conclude that the I.C.J. has not adopted the strict interpretation of the U.N. Charter, condemning all interventions by force, to which a majority of current legal scholars subscribe.[92] This conclusion, however, is probably premature in light of the court's failure to even address the legality of the mission.

There are two additional points that should be made with regard to the Iranian hostage incident. The first is that the crisis served to heighten the consciousness of the world community to the increase of state terrorism and, more specifically, hostage-taking as a method of coercion. The full effect of this turn of events on the current doctrine of intervention to protect nationals remains to be seen. The second related point is that the Iranian hostage incident served to underscore the inability of the U.N. Security Council to deal with emergency situations of this nature, a topic that will be discussed in more detail below.[93]

E. THEORIES ON THE LEGALITY OF INTERVENTION TO PROTECT NATIONALS

Theorists are in disagreement as to the legality of intervention to protect nationals when the state in which the nationals are located is unable or unwilling to protect them. There are three broad categories of theories which, for the scope of this section, are useful in presenting the claims. First is the argument which can be labeled as the restrictive theory; the second argument may be called the realist approach; last is the self-defense theory.[94]

F. THE RESTRICTIVE THEORY

Under the restrictive theory, forcible intervention to protect nationals is unlawful under the U.N. Charter. This theory is the position of a majority of the members of the United Nations[95] and is

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[92]United States v. Iran, 1980 I.C.J. at 43, 55; Note, Iran, *supra* note 77, at 517.
[93]*See infra* notes 117-35 & accompanying text.
[94]Note, Iran, *supra* note 77.
[95]R. Higgins, The Development of International Law Through the Political Organs of the United Nations 167-230 (1963); Note, Iran, *supra* note 77, at 487.

shared by many legal scholars.[96] The theory derives from three premises. First, the primary goal of the United Nations is the maintenance of peace. Second, only the United Nations may use force, except in clear cases of self-defense. Third, permitting the use of force by states for any other reason would only provide an excuse for geopolitical intervention.[97]

The restrictive theory interprets Articles 2(4)[98] and 51[99] of the U.N. Charter jointly, as the exclusive rule on the legal use of force by states. Under this view, Article 2(4) was meant to prohibit the use of force by individual states. This "plain meaning interpretation of the prohibition on the use of force is said to be buttressed by the *travaux preparatories* of the Charter and by the reaffirmation of the prohibition in the concluding phrase of Article 2(4) stating "or in any other manner inconsistent with the purposes of the United Nations."[100]

Article 51 is viewed as a narrow exception for self-defense in case of an "armed attack" on a state. An attack on nationals of a state outside the state does not fall within the narrow exception according to the restrictive theory.[101]

To support this interpretation of Articles 2(4) and 51 of the Charter, the restrictive theory cites the principle of nonintervention, buttressed by two resolutions of the U.N. General Assembly and by positions taken by U.N. member states.[102]

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[96]Brierly, *supra* note 69, at 413-32; Brownlie, *supra* note 84, at 218; Note, Iran, *supra* note 77, at 487.

[97]Brownlie, *supra* note 84, at 219; Note, Iran, *supra* note 77, at 487.

[98]Article 2(4) of the Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[99]Article 51 of the Charter provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[100]Note, Iran, *supra* note 77, at 489.

[101]*Id.*

[102]*Id.*

G. THE REALIST APPROACH

The realistic theory of the right to use force to protect nationals is based on the belief that there are two major purposes of the U.N. Charter.[103] As stated by Professor Lillich: "Examining the United Nations Charter 'as a whole', it is apparent that its two major purposes are the maintenance of peace and the protection of human rights."[104] Under this approach, the protection of human rights is equally as important as the maintenance of peace. As such, humanitarian reasons may justify unilateral use of force by a state. Protecting a state's own nationals is a corollary of this argument.[105]

Under pre-Charter customary international law, states had a right to intervene to protect their nationals in another state.[106] The realist approach to Article 2(4) links the customary law right to protect nationals to the rights and duties of states under the U.N. Charter. Under this interpretation, when the U.N. does not act, the customary law right to protect nationals revives and states may intervene as they could before the U.N. Charter.[107]

The theory is not based upon Article 51 of the Charter dealing with self-defense. It claims that, under certain circumstances, humanitarian intervention, whether to protect a state's own nationals or those of another state, is inconsistent with the U.N. Charter. A self-defense rationale could not be employed in a situation in which nationals of another state were involved. Further, there is no need to use Article 51 as an exception to Article 2(4) because Article 2(4) is not viewed as a prohibition on the use of force to protect human rights. A right to use forcible self-help does not exist because it is permitted by Article 51, but because it is not prohibited by Article 2(4).[108]

The realist theory does not advocate unlimited intervention to protect nationals. The strictness of analyzing models vary, but all center

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[103]McDougal, *supra* note 75; Note, Iran, *supra* note 77, at 491. Other scholars who generally adopt the realist approach are listed in Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in Law and Civil War in the Modern World 229, 241 (J. Moore ed. 1974).

[104]Lillich, *supra* note 103, at 236.

[105]Note, Iran, *supra* note 77, at 492.

[106]*See supra* note 73 and accompanying text.

[107]Note, Iran, *supra* note 77, at 492.

[108]Note, Iran, *supra* note 77, at 496.

around two fundamental principles, necessity and proportionality.[109]

H. THE SELF-DEFENSE THEORY

The self-defense theory postulates that an injury to a state's national in another state, which is unable or unwilling to protect that national, is an injury to the national's state.[110] The injury is therefore a breach of duty to the national's state that justifies protective intervention.[111]

Under pre-Charter customary international law, a right to protect nationals existed.[112] This right survived the Charter in Article 51's exception to the prohibition on the use of force in Article 2(4): "Action undertaken for the purpose of, and limited to, the defense of a state's political independence, territorial independence, territorial integrity, [or] the lives . . . of its nationals . . . cannot by definition involve a threat or use of force 'against the territorial integrity or political independence' of any other state."[113]

The United States, Great Britain, Belgium, and Israel are states that adhere to the self-defense theory of protecting nationals.[114] During the Iranian hostage crisis, the United States specifically invoked a theory of self-defense to justify its rescue attempt, calling the hostages "victims of the Iranian armed attack on our Embassy."[115]

Like the realist theory, the self-defense theory has threshold criteria to justify intervention to protect nationals. Professor Bowett expressed the limitations on the self-defense theory as follows:

> Its exercise must be subject to the normal requirements of self-defense, that is to say, there must exist a failure in the territorial state to accord the protection for aliens demanded by international law, there must be an actual or

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[109]Lillich, *supra* note 103; McDougal, *supra* note 75; Moore, *Toward an Applied Theory for the Regulation of Intervention*, in Law and Civil War in the Modern World 3 (J. Moore ed. 1974); Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order—Part I*, 43 Denver L.J. 439 (1966).

[110]Bowett, *supra* note 73, at 87.

[111]Note, Iran, *supra* note 77, at 498.

[112]*See supra* note 73 and accompanying text.

[113]Bowett, *supra* note 73, at 185-86.

[114]Note, Iran, *supra* note 77, at 498.

[115]*Id.* at 512 (citing Letter from U.S. Ambassador Donald McHenry to the President of the Security Council (Apr. 25, 1980), U.N. Doc. S 13908).

imminent danger requiring urgent action, and the action must be proportionate and limited to the necessities of extricating the nationals from the danger.[116]

I. AN ANALYSIS OF THE THEORIES ON INTERVENTION TO PROTECT NATIONALS

In analyzing the three theories of intervention to protect nationals, an examination of fundamental values of the participants is appropriate. First, the relationship of an individual to his or her state should be discussed. In the creation of an agency of government, the individuals who make up a state give up, not their rights, but the individual exercise of those rights in order that the government may exercise the rights in behalf of the community as a whole.[117] The duties are reciprocal; the individual makes concessions to the state, which in turn, must protect the rights of the individual. Thus, protecting nationals of a state, either within the state or when they are located in another state, is a fundamental value of the world community, for it is the correlative duty of the state for its right to act as a state.

Balanced against this value are the well-defined rights of states to territorial integrity and political independence. In the century after the 1648 Treaty of Westphalia, the European state system was established on two bases: the political principle of territoriality and the legal principle of sovereign equality. The first basis concerned the effective control by the local ruler within established territorial limits. The second basis required the complete political jurisdiction of the ruler and his government within these territorial boundaries, unencumbered by any external authority.[118] The concept of this system has evolved and been universally adopted in the Charter of the United Nations.[119] Specifically, Article 2(4) of the Charter pro-

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[116]Bowett, *The Interrelations of Theories of Intervention and Self-Defense*, in Law and Civil War in the Modern World 38, 44 (J. Moore ed. 1974).

[117]1 J. Scott, Law, The State, and The International Community 27 (1939).

[118]Wood, *Intervention and Detente in American Foreign Policy, reprinted in* 62 U.S. Naval War Coll. Int'l L. Studies 118 (1980).

[119]For a collection of essays surveying state views on sovereignty and law, *see* Sovereignty Within the Law (A. Larson ed. 1965).

scribes "the threat or use of force against the territorial integrity or political independence of any state . . .."[120]

The restrictive theory of protection of nationals argues that the plain language of the Charter and its accompanying negotiating history indicate the drafters' clear intent that value of the protection of nationals is subservient to the values of territorial and political independence. The historical context of the Charter must be examined to arrive at a reasonable current comparison of these competing values.

The Charter was drafted at the end of the Second World War. Nazi and militarist Japanese aggression had been stopped by the allies at great cost to the entire world. There was then, relative to today, a consensus of values among the allies. Because of this consensus, collective enforcement of the peace was deemed a feasible and reasonable alternative to unilateral self-help.

In his noted treatise, written shortly after the Charter came into force, Judge Phillip Jessup expressed this optimistic point of view:

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[120]Article 2 of the United National Charter provides:

> The organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> 1. The Organization is based on the principle of the sovereign equality of all its Members.
>
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
>
> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.
>
> 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
>
> 6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
>
> 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

> The landing of armed forces of one state in another state is a 'breach of the peace' or 'threat to the peace' even though under traditional international law, it is a lawful act. It is a measure of forcible self-help, legalized by international law because there has been no international organization competent to act in an emergency. The organizational defeat has now been at least partially remedied through the adoption of the Charter, and a modernized law of nations should insist that the collective measures envisaged by Article I of the Charter shall supplant the individual measures approved by traditional international law.[121]

Unfortunately, the optimism of early post-Charter years has not proved justifiable. The Military Staff Committee and the contingency U.N. forces described in Chapter VII of the Charter, have never come into existence.[122] There currently is no standing force to aid

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[121]P. Jessup, A Modern Law of Nations 169-70 (1952).

[122]Chapter VII of the United Nations Charter consists of Articles 39 through 50 and provides as follows:

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nationsl to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to main-

tain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the

the Security Council in its responsibilities of peacekeeping in the world. More importantly, the Security Council itself has proven unable to reach the necessary consensus to effectively deal with threats to peace in the world community; five years after the adoption of the Charter, the Security Council failed the first major test of its ability to deal with a threat to world peace.

1. The Korean Conflict

On June 25, 1950, North Korean forces invaded the territory of the Republic of Korea. A meeting of the Security Council was held the same day and, in the absence of the Soviet representative, who had walked out of the Security Council in January 1950 over a dispute concerning Chinese representation in the Security Council, a resolution was adopted declaring that the North Korean action constituted a breach of the peace and calling for the withdrawal of North Korean forces.[123] On June 27, 1950, the Security Council recommended that members furnish assistance to the Republic of Korea, and, on July 7, 1950, the Council established a unified command under the United

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disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

[123]M. McDougal & Associates, Studies in World Public Order 718-22 (1960); L. Sohn, The Korean Question, The United Nations in Action, Ten Cases From United Nations Practice 63 (1968).

States. Finally, the Council decided on July 31, 1950 to give the Unified Command responsibility for the relief and support of the civilian population of Korea.[124]

The Soviet Union returned to the Security Council in August 1950 and, by their veto, prevented the Security Council from taking further enforcement measures under the Charter.[125] Because of the deadlock in the Security Council, the Korean problem was, over strong Soviet objection, referred to the General Assembly for action.[126]

On November 3, 1950, the General Assembly, by an overwhelming majority adopted the "Uniting for Peace" Resolution.[127] The Resolution recognizes the Security Council's primary responsibility under the Charter for the maintenance of international peace and security, but also recognizes the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto. The Resolution recognized that a failure of the Security Council to discharge its responsibilities did not relieve the member states of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security. Thus, the General Assembly resolved that, if the Security Council, because of a permanent member veto, failed to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly could then consider the matter immediately with a view to making appropriate recommendations to the members for collective measures, including, in the case of a breach of the peace or act of aggression, the use of armed force when necessary to maintain or restore international peace and security.[128]

Professor McDougal has aptly summarized the effects of the Uniting for Peace Resolution on interpretation of the Charter in light of changed circumstances and in order to give efficacy to the fundamental purposes of the Charter:[129]

> The almost unanimous adoptions by the General Assembly of the 'United Action for Peace' resolutions represents an encouraging example of interpretation of this Charter in terms of its major purposes. This interpretation does in-

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[124]5 SCOR (1950), at 4-5, U.N. Doc. No. S/INF/5/Rev. 1.
[125]*Id.*
[126]Sohn, *supra* note 123, at 72-76.
[127]G.A. Res. 377 A(V), 5 GAOR Supp. (No. 20) at 10-12, U.N. Doc. No. A/1775 (1950).
[128]*Id.*
[129]For a contrasting approach, *see* Gross, *Voting in the Security Council: Abstention From Voting and Absence From Meetings*, 60 Yale L.J. 209 (1951).

> deed reflect a change in emphasis regarding the procedures by which the United Nations will deal with threats to international peace and security. It was originally hoped that there would be sufficient unanimity among the great powers to enable the organization to require the mandatory action of all the members to repel aggression. In the absence of that unanimity resort has been made to other provisions of the Charter enabling the United Nations to achieve security by recommending the voluntary action of its members. There is nothing 'illegal' about this change. It is simply a rational evolution, well within the words of the charter, to meet new and unanticipated contingencies.[130]

2. A Realistic Approach to Interpreting the Charter

Even in the optimism of the early post-Charters years, Judge Jessup recognized that the collective measure mandate of the Charter may not be a complete *panacea*. In the section of his book dealing with protection of nationals, after making the previously quoted pronouncement on the collective enforcement measures of the Charter, Jessup added the following *caveat*:

> It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life. It may take some time before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international action shall be timely as well as powerful.[131]

A lack of effective collective enforcement through the Security Council of the United Nations is in fact the state of the world community today. This deviation from the Charter's projected course has caused many member states and leading international legal scholars to reassess their views on interpreting the minimum world order system of the Charter.[132] Professor McDougal's remarks in a

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[130]McDougal & Associates, *supra* note 123, at 758.

[131]Jessup, *supra* note 121, at 170-71.

[132]Lillich, *Forcible Self-Help Under International Law, reprinted in* 62 U.S. Naval War Coll. Int'l Studies 129 (1980).

lecture at the United States Naval War College are illustrative of this point:

> I'm ashamed to confess that at one time, I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake, that article 2(4) and article 51 must be interpreted differently.

Professor McDougal conceded that a strict interpretation of the Charter was probably the original intent of the framers, but added:

> There are other principles of interpretation. One principle, perhaps the most honored among states, is that of interpretation in accordance with the major purposes of the parties, sometimes called the principle of effectiveness. Another principle is that of interpretation in accordance with subsequent conduct of the parties. It is not the preliminary negotiations, and not the words of the Charter only that create contemporary expectations about the prescriptions of the Charter, the words that preceded it, and the whole subsequent flow of words and interpretation by conduct which are relevant to the interpretation of what law is today.[133]

As in the correlative duty of a state to protect its nationals who have transferred the exercise of their rights to the state, the United Nations has a duty to properly function as designed or the customary law rights of states to self-help revive. The alternative restrictive view of reading the Charter would, in addition to failing to secure world peace, reward and encourage the outlaws of the world community for aggressive behavoir. Such reward has a far more destructive effect on world order than a reasonable allowance of unilateral or regional collective self-help when the collective measures of the Charter are not timely available.

The conclusion that the realist and self-defense theories present lawful and workable theories for self-help does not mean that the use of force for self-help is without limits. "Such use of force must be subject to limitations comparable to those that self-defense is subject to, with due allowance for the difference in context."[134] The customary law requirements of necessity and proportionality are, as

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[133]McDougal, *Authority to Use Force on the High Seas, reprinted in* 61 U.S. Naval War Coll. Int'l Studies 559 (1980).

[134]*Id.* at 560.

in self-defense, applicable to self-help measures. These requirements, in the context of protecting nationals, may be stated as three criteria: First, there must be an imminent threat of injury to the nationals of the intervening state; second, the territorial sovereign of the state in which the nationals are located must be unable or unwilling to protect the nationals of the intervening state; and third, the use of force must be confined to the object of protecting the nationals of the intervening state.[135]

J. THE GRENADA INTERVENTION UNDER THE REQUISITE CRITERIA FOR PROTECTION OF NATIONALS

1. The Threat to Nationals of the United States

The increasingly chaotic conditions in Grenada from the arrest of Prime Minister Bishop until the intervention of the joint security force have been detailed above. The period was one of a breakdown of order, indiscriminate shootings, closing of travel to or from the island, a news blackout, and a 24-hour shoot-on-sight curfew. Initial attempts to reach Grenada by American diplomats were unsuccessful. When the diplomats did meet with representatives of General Austin's faction, an orderly evacuation could not be arranged. The conclusion of the diplomats was that the American citizens were in imminent danger. That conclusion was shared by Dr. Geoffrey Bourne, the Vice Chancellor of the St. George's University School of Medicine. Dr. Bourne had been on Grenada since 1978 and was actively involved in the medical school's relations with Grenada. He met with General Austin after Bishop's assassination and participated in the negotiations to evacuate the American citizens. In his testimony before congressional hearings on the military action in Grenada, Dr. Bourne expressed his assessment of the threat to the American medical students on Grenada:

> The critical question after I had worked with General Austin, pretty well continuously through the 4 days of the 24-hour curfew, the critical question then was were the students safe. And when General Austin thought the group from the U.S. Embassy was going to take all the students out, he reacted very strongly to me and as a result of that, I actually had grave doubts if they could have been gotten out.

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[135]Bowett, *The Interpretation of Theories of Intervention and Self-Defense*, in Law and Civil War in the Modern World (J. Moore ed. 1974).

> Under these circumstances, it was better for me to tell the students they should remain rather than give the illusion that they could get out, which could have been psychologically disastrous had they subsequently been prevented from doing so.[136]

Dr. Bourne further described the assurances that General Austin had given him for the safety of the students, but questioned what these assurances meant in practical terms. The students were frightened that anti-Austin groups would start civil riots and "that a dangerous and turbulent situation might develop."[137] Dr. Bourne also pointed out that there was a possibility that General Austin, like Bishop, might be assassinated and replaced by someone with no concern for the medical school and its students.

Dr. Bourne concluded that, because Austin had executed his close friends and colleagues, his reassurances of safety were those of "a dangerous man whose word could not be trusted."[138]

In concluding his remarks on the threat to the students in Grenada, Dr. Bourne stated that he would have preferred the situation to have been resolved by diplomatic means; however, he questioned the feasibility of this course of action:

> Would Austin have suffered the same fate as Bishop if he had tried to make a deal with the Americans? To what extent would Austin have simply used negotiations to buy time?
>
> Would Bernard Coard, whom I knew reasonably well, have ordered such negotiations stopped? Would the Russians and Cubans have taken the opportunity to pour even more arms and troops into Grenada while diplomatic negotiations were going on? The whole situation with the students may have suddenly gone into reverse and the school have found itself in a hostage situation.[139]

Finally, Dr. Bourne stated:

> There is no doubt we had a volatile and highly dangerous situation as far as the students were concerned, which could have become disastrous at any minute, and one can

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[136]House Hearings, Grenada, *supra* note 49, at 177.

[137]*Id.* at 178.

[138]*Id.* at 179. Indeed, documents captured by the joint security force indicated that consideration had in fact been given to the use of the Americans on the island as hostages. *See supra* note 58.

> only conclude that the so-called invasion which it looks now was certainly a rescue mission was amply justified from the point of view of the students, apart from the political and strategic gains which I believe it made for the United States and in fact for the Western democracies.[140]

It should also be noted that the medical students were not the only U.S. nationals on Grenada. Retirees and missionaries scattered throughout the island brought the total of United States nationals on the island to approximately 1,000.[141]

2. The Ability and Willingness of Grenadian Authorities To Protect United States Nationals

The situation on Grenada prior to the intervenion was one of increasing anarchy, characterized by the inability of any one group to take effective control and give reasonable assurances for the safety of United States nationals on the island. General Austin claimed that the medical students were safe, yet, an orderly evacuation could not be arranged. Austin's assertion of control and his word were both in question. There was no guarantee that General Austin could stabilize the situation or, even if he could, that he would keep his word. moreover, Governor-General Scoon, while under house arrest by the Austin faction, sent a request for assistance which pointed to the "vacuum of authority in Grenada following the killing of the prime minister and the subsequent seious violations of human rights and bloodshed." Sir Paul was, "therefore, seriously concerned over the lack of internal security in Grenada."[142]

Thus, both the ability and willingness of Grenadian authorities to protect United States nationals was in serious question at the time the intervention occurred. Watchful waiting could have produced a number of possible outcomes, some favorable, but most unacceptable.

3. The Objective of the Intervention

To meet the last criteria for lawful intervention to protect nationals, the use of force must be confined to the object of protecting the nationals. At first blush, this requirement might seem to require that only a surgical-like operation is permitted. Two recent examples

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[140]House Hearings, Grenada, *supra* note 49, at 179.

[141]*See supra* note 5 & accompanying text.

[142]The full text of Sir Paul Scoon's letter may be found *supra* in the text accompanying note 65.

of intervention to protect nationals illustrate that the factual context of a situation can effect the scope of a mission without affecting its limited objective to protect nationals. In the Entebbe raid in Uganda in July 1976, Israeli forces were able to limit their operations strictly to the airfield at which the Israeli citizens were being held hostage. The opportunity for a surgical-like operation was clear. In the 1964 Congo rescue operations, the Belgian forces that intervened to protect Belgian and third country nationals faced a different situation. There, the endangered nationals were spread over a wider location. Nevertheless, the Congo intervention is widely regarded as lawful[143] because, like the situation in Grenada, there was an invitation to intervene to protect nationals spread over the Stanleyville area, an area which the government was unable to assume control. In Grenada, there were large concentrations of Americans on the two medical school campuses, but there were also Americans spread all across the small island. Evacuating only the medical students from the two campuses might have further exacerbated the situation for the remainder of the American citizens. For this reason, the geographical scope of the intervention was not overly broad. The objectives of the mission, however, were broader than the rescue of United States nationals. After stabilizing the island to an extent that would have permitted the orderly evacuation of those nationals who chose to depart Grenada, the joint security force did not depart. The subsequent actions of the joint security force can therefore not be claimed to be legitimized by the doctrine of intervention to protect nationals. As such, this ground for intervention, while presenting a compelling moral argument for the joint security force intervention, will not stand alone as a legal basis for the intervention.

IV. HUMANTARIAN INTERVENTION

A. INTRODUCTION

Of the four major legal theories dealing with intervention, the theory of humanitarian intervention is undoubtedly the most controversial.[144] Though the doctrine of humanitarian intervention has roots dating back to the Crusades, it is largely a creation of the latter part of the nineteenth century.[145] Lauterpacht indicated that there has been

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[143]*See supra* note 84 & accompanying text.

[144]*See* Brownlie, *supra* note 84; Lillich, *supra* note 103. *See also* Donnelly, *Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics*, 37 J. Int'l Affairs 311, 314 (1984).

[145]Fonteyne, *The Customary Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 Cal. W. Int'l L.J. 203, 205 (1974).

> a substaintial body of opinion and practice in support of the view that there are limits to [the] discretion [of states in how they treat their nationals] and when a State renders itself guilty of cruelties against and persecutions of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible . . ..[146]

Fonteyne, after analyzing nineteenth and twentieth century examples of humanitarian intervention, concluded that, despite its infrequent invocation, there does exist a pre-Charter principle of customary law recognizing humanitarian intervention.[147] He further formulated the doctrine of pre-charter scholars as

(1) disinterestedness of the intervening Power(s), in the sense of a non-seeking of particular interests of individual advantages;

(2) restriction of the applicability of the theory to the extreme cases of atrocity and breakdown of order;

(3) active participation or passive complicity or condonation of the violations by the sovereign;

(4) general predilection for collective action, by preference at the hands of the Major Powers, who have a particular responsibility for ensuring overall respect of minimal international standards of treatment of local populations.[148]

The question remains, has this principle survived the U.N. Charter?

B. THE BANGLADESH INTERVENTION

Following the passage of the India Independence Act, India and Pakistan became independent countries in 1947. The split of the former British Crown Colony was primarily based upon religious differences. Pakistan, the Islamic portion of the former colony, was further divided into two parts. Other than their common religion, there were few bonds between the two sections. The Urdu-speaking people of West Pakistan were more closely aligned to the countries of the Middle East, while the Bengali-speaking inhabitants of East

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[147]Fonteyne, *supra* note 145, at 232.
[148]*Id.*

Pakistan had more in common with India. The majority of the population of Pakistan was in the East. The economic and military power was in the West. However, the leaders there were insensitive to the political aspirations of the East.[149]

In 1958, the Pakistani Army seized control of the government. Until 1971, despite a new constitution in 1962, the government was basically a military dictatorship. The period was marked by social inequality and growing disorder. In 1969, President, formerly General, Ayub Khan attempted to arrive at reform through negotiations with opposition leaders and by freeing certain political prisoners. The army, however, remained adamant in their refusal to allow direct elections, to terminate emergency regulations, and to allow autonomy for the East. Law and order broke down and full power was ceded back to the army.[150]

General Yahya Khan reimposed martial law, promising to later return the government to civilian control. In December 1970, elections were held on a one-man, one-vote basis. East Pakistan, with a majority of the population, gained a majority of the assembly seats. There were fundamental differences between the majority view from East Pakistan and the minority view from West Pakistan over the economic autonomy of the East. Both parties considered their view to be non-negotiable. In February, now-President Yahya Khan dismissed his cabinet, returned full control to the army, and postponed the convening of the Assembly indefinitely.[151]

The period from March 1 to 25 was one of strikes and sporadic violence. On March 23, East Pakistan declared its independence and christened itself Bangladesh.[152] "On March 25 the Pakistani army commenced an orgy of killing, terror, and destruction in East Pakistan. Bengalis were hunted down, prime targets being [majority party] politicians, professors, students and Hindus."[153] Within two days, thousands had been killed, the majority party banned, and all political activity forbidden.[154]

Over the next six months, millions of refugees fled to India. Guerrilla activity in East Pakistan was met with increasingly brutal reprisal. In October 1971, President Yahya Khan, concerned about

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[149]R. Lillich & F. Newman, Problem VIII, Bangladesh, International Human Rights 484, 485 (1979).
[150]*Id.* at 486.
[151]*Id.*
[152]*Id.*
[153]*Id.*
[154]*Id.*

the buildup of the Indian Army, invited the Secretary-General of the United Nations to visit India and Pakistan to discuss troop withdrawal from the border areas. India and the provisional government of Bangladesh opposed this plan.[155]

Incidents on the East Pakistan border increased and, on December 3, 1971, Pakistan ordered a pre-emptive air strike against Indian air bases. India considered this an act of war and, on December 6, invaded Pakistan in both the East and West. It also formally recognized Bangladesh. The war lasted twelve days, ending with the Pakistani forces surrender on December 16, 1971. Atrocities were committed by both sides in the war's closing days.[156]

The role of the United Nations in this tragedy to this point had been limited to disaster relief and refugee assistance. It was not until December 1971 that the Security Council, deadlocked by veto, passed the matter to the General Assembly, which called for an immediate ceasefire and for troop withdrawals. India refused to cooperate, considering the General Assembly recommendation to be unrelated to the problem and therefore unacceptable. The United Nations and its component organs did little else.[157]

Prompted by this inaction, an international conference of jurists asked the International Commission of Jurists to look into the matter. In September 1971, a Commission of Enquiry into the Events in East Pakistan was formed. India and the provisional government of Bangladesh cooperated with the Commission. The government of Pakistan did not, arguing that the matter was solely one of domestic concern.[158]

The Commission made findings of fact consistent with those described above. They examined the pre-Charter customary international law and concluded that humanitarian intervention was a recognized doctrine. They addressed those who had denied that the doctrine survived the Charter:

> Some authorities have argued that the right of unilateral intervention has been completely supplanted by . . . procedures for collective humanitarian intervention under the United Nations. But what if violations of human rights on a massive scale are not even considered in the United Nations to see whether they constitute a 'threat to the

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[155] *Id.*
[156] *Id.* at 487.
[157] *Id.*
[158] *Id.*

> peace,' and if international organizations offer no redress or hope of redress? Must everyone remain impassive in the face of acts which revolt the human conscience, paralyzed by considerations which are primarily of a procedural nature or even - which is worse - by procedural obstruction? When it is clear that the international authorities cannot or will not discharge their responsibilities, it would seem logical to resort again to customary international law, to accept its rules and the validity of the doctrine of humanitarian intervention.[159]

The Commission recognized the dangers of abuse implicit in the doctrine and therefore suggested the following as normative requirements for satisfaction prior to intervention:

1. The state against which measures are to be taken must have shown itself manifestly guilty in respect of its citizens of systematic cruelty and persecution to the point at which
   (a) their fundamental human rights are denied them, and
   (b) the conscience of mankind is shocked and finds that cruelty and persecution intolerable.
2. The circumstances must be such that no practicable peaceful means of resolving the problem is available, such as negotiations with the state which is at fault, intermediation, or submission to a competent international organization.
3. The international community must have had the opportunity within the limits imposed by the circumstances:
   (a) to ascertain whether the conditions justifying humanitarian intervention do in fact exist, and
   (b) itself to solve the problem and change the situation by applying such measures as it may deem appropriate.
4. If the international community does not avail itself of the opportunities offered and fails to act in order to prevent or put a stop to widespread violations of human rights which have been called to its attention, thereby leaving no choice but intervention, then a state or group of states

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[159]Secretariat of the International Commission of Jurists, The Events in East Pakistan, 1971, A Legal Study 94 (1972) (footnotes omitted).

will be justified in acting in the name of humanity provided that:

(a) before resorting to force it will deliver a clear ultimatum or 'peremptory demand' to the state concerned insisting that positive actions be taken to ameliorate the situation;

(b) it will resort to force only within the strict limits of what is absolutely necessary in order to prevent further violations of fundamental rights;

(c) it will submit reports on its actions to the competent international agency to enable the latter to know what is being done and to intervene if it sees fit to do so;

(d) it will withdraw the troops involved in the intervention as soon as possible.[160]

India's stated grounds for intervention were self-defense and support for the new government of Bangladesh. The Commission rejected these grounds, but went on to evaluate India's action under the doctrine of humanitarian intervention, stating:

> In conclusion, therefore, we consider that India's armed intervention would have been justified if she had acted under the doctrine of humanitarian intervention, and further that India would have been entitled to act unilaterally under this doctrine in view of the growing and intolerable burden which the refugees were casting upon India and in view of the inability of international organizations to take any effective action to bring to an end the massive violations of human rights in East Pakistan, which were causing the flow of refugees. We also consider that the degree of force used was no greater than was necessary in order to bring to an end these violations of human rights.[161]

C. THE LEGAL DOCTRINE

The doctrine of humanitarian intervention remains quite controversial. The vast majority of legal scholars and world opinion

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[160] *Id.* at 95.
[161] *Id.* at 96.

have not recognized the legality of the doctrine under post-Charter international law. Professor Brownlie, for example, stated:

> Leading modern authorities who either make no mention of humanitarian intervention and whose general position militiates against its legality, or expressly deny its existence include Brierly, Castren, Jessup, Jimenez de Arechaga, Briggs, Schwarzenberger, Goodrich, Hambro and Simons, Skubiszewski, Friedman, Waldock, Bishop, Sorensen and Kelsen. In the lengthly discussion over the years in United Nations bodies of the definition of aggression and the principles of international law concerning international relations and cooperation among states, the variety of opinions canvassed has not revealed even a substantial minority in favor of the legality of humanitarian intervention.[162]

These scholars and world leaders believe that the Charter is primarily concerned with keeping peace in the world. Humanitarian intervention is therefore prohibited under article 2(4) and the meaning of that prohibition is absolute.[163]

Despite Professor Brownlie's conclusions, there are a growing number of scholars who favor limited humanitarian intervention. The consensus of these scholars points out that, in addition to peacekeeping, the Charter was designed to protect human rights. Thus, humanitarian intervention is consistent with the purposes and principles of the Charter and is not directed against "the territorial integrity or political independence of any state."[164]

These scholars and those of the International Commission of jurists in the case of East Pakistan have recognized the need for norms of humanitarian intervention. In addition to those of the International Commission of Jurists, Professors Nanda and Lillich would give strong weight to any invitation to intervene by a recognized government.[165] Professor Moore would also consider the effect on authority structures necessary to protect the threatened rights.[166]

The value of these normative standards is that they provide criteria by which the legality of humanitarian intervention can be

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[162]Brownlie, *supra* note 84, at 218-19 (footnote omitted).
[163]*See supra* note 69 & accompanying text.
[164]Moore, *supra* note 12, at 154.
[165]Nanda, *supra* note 109, at 475.
[166]Moore, *supra* note 109, at 25.

measured. Even under the absolutist point of view, the norms prescribed can, as Professor Brownlie stated, provide "good criteria, should humanitarian intervention become a part of the law, and . . . [provide] a fine basis for a political plea in mitigation in parliaments, U.N. organs, and regional organizations."[167]

Moreover, scholars of both schools of thought agree that humanitarian intervention at the behest of a recognized government who is unable to protect its nationals is a legally justified gound for intervention.[168]

D. CONCLUSIONS ON HUMANITARIAN INTERVENTION

The facts of the Grenada intervention do not appear to support the contention that conditions in Grenada had deteriorated to the extent necessary for unilateral humanitarian intervention. Additionally, there were few attempts to alter the conditions through diplomacy prior to the intervention. That is not to say, however, that a halt of those abuses of human rights that had occurred and a prevention of others are factors which have no bearing on the overall assessment of the Grenada intervention. Moreover, the Grenada intervention occurred at the invitation of Grenada's Governor-General. At best, humanitarian intervention is a legal basis for the intervention; at worst, it is a strong mitigating factor to be considered in conjunction with other bases for the intervention.

V. REGIONAL PEACEKEEPING

A. INTRODUCTION: THE DOMINICAN REPUBLIC INTERVENTION OF 1965

One justification asserted for the intervention in Grenada was that of peacekeeping under a regional agreement.[169] The 1965 intervention and organization of American States peacekeeping action in the Dominican Republic is a classic example of this type of action.

On May 30, 1961, Rafael Leonidas Trujillo Molina, the dictator of the Dominican Republic, was assassinated. President Joaquin

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[167]Brownlie, *supra* note 84, at 225.
[168]*Id.* at 227; Moore, *supra* note 12, at 154.
[169]*See supra* note 5 & accompanying text.

Balaguer took over and was replaced after a *coup* and counter-*coup* by his Vice President, Rafael Bonnelly, on January 18, 1962. Juan Bosch was elected President on December 20, 1962, inaugurated on February 26, 1963, and ousted by a military *coup* on September 25, 1963. The reins of government were placed in the hands of a three-man civilian *junta* of which J. Donald Reid Cabral became the head on December 22, 1963.[170]

The revolt that began on April 24, 1965 arose out of this unstable political situation in the Dominican Republic. The Cabral government did not have a popular mandate. Its handling of the unsatisfactory economic situation in the Republic was cause for further political strain.

Some of the senior military officers who had been removed by the Cabral government were resentful. Certain junior military officers felt that the military reforms had not been broad enough and that the government was acting too slowly. The Dominican Revolutionary Party was seeking to restore to power the ousted former President Bosch.[171]

A loose association of these elements staged a revolt on April 24, 1965, occupying a large part of the Capital City of Santa Domingo.[172] The next day, Cabral resigned and went into hiding. Rebels seized the national palace and a leader of the Dominican Revolutionary Party was named provisional president.[173]

On April 26, General Elias Wessin y Wessin led a counter attack.[174] Air attacks were conducted against Santa Domingo.[175] Large quantities of arms were distributed by the rebels to the civilian populace. Disorder grew rapidly. Efforts by the United States Embassy to effectuate a cease-fire were unsuccessful. A large number of American citizens assembled at a hotel west of Santa Domingo requesting protection and evacuation.[176]

On April 27, there was a complete breakdown of law and order. The rebel provisional president abondoned his office of two days and took asylum in a Latin American Embassy.[177]

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[170]L. Sohn, The Situation in the Dominican Republic, The United Nations in Action, Ten Cases From United Nations Practice 354 (1968).

[171]Meeker, *The Dominican Situation in the Perspective of International Law*, 53 Dep't St. Bull. 60, 61 (1965).

[172]*Id.*; Sohn, *supra* note 170, at 354.

[173]Meeker, *supra* note 171, at 61.

[174]Sohn, *supra* note 170, at 354.

[175]Meeker, *supra* note 171, at 61.

[176]*Id.*

[177]*Id.*

On April 28, the situation continued to deteriorate. Reports of indiscriminate shooting increased and the police were unable to control armed mobs who were terrorizing the city and firing on homes and other buildings.[178] The United States Embassy was under machine gun fire.[179] The United States Ambassador to the United Nations, Adlai Stevenson, described the situation to the Security Council on May 3:

> In the absence of any governmental authority Dominican law enforcement and military officials informed our Embassy that the situation was completely out of control, that the police and the Government could no longer give any guarantee concerning the safety of Americans or of any foreign nationals and that only an immediate landing of United States forces could safeguard and protect the lives of thousands of American and thousands of citizens of some thirty other countries. At that moment, the United States Embassy was under fire; the death toll in the city according to Red Cross estimates, had reached 400; hospitals were unable to care for the wounded; medical supplies were running out; the power supply had broken down; and a food shortage threatened.[180]

Responding to these facts and the requests for assistance, President Johnson sent 400 Marines into the Dominican Republic, submitted the matter to the Council of the Organization of American States, and notified the United Nations.[181] United States forces were soon increased to more than 20,000.[182]

From April 29 to May 3, the Organization of American States acted. It called for a cease-fire, appealed for the establishment of an international zone of refuge in Santa Domingo, sent a five-member commission to the Dominican Republic, and asked member states to supply food and medicine.[183] On May 5, the OAS Committee negotiated a cease-fire; however, it lasted only a week.[184]

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[178]*Id.*
[179]Sohn, *supra* note 170, at 354.
[180]20 U.N. SCOR (Mtg. 1196) (3 May 1965).
[181]*Id.*. See also Meeker, *supra* note 171, at 61-62; Sohn, *supra* note 170, at 354.
[182]Nanda, *supra* note 109, at 469.
[183]Meeker, *supra* note 171, at 440.
[184]Sohn, *supra* note 170; at 354.

On May 6, the Tenth Meeting of Consultation of OAS Foreign Ministers resolved:

> To request governments of member states that are willing and capable of doing so, to make contigents of their land, naval, air or police forces available to the Organization of American States within their capabilities and to the extent they can do so, to form an inter-American force that will operate under the authority of this Tenth Meeting of Consultation.[185]

The resolution further provided:

> That this Force will have as its sole purpose in a spirit of democratic impartiality, that of cooperating in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establishment of an atmosphere of peace and conciliation that will permit the functioning of democratic institutions.[186]

Regulations for setting up the command were agreed to by the six countries who contributed to the Force and a General of the Brazilian Army took command on May 31, 1965.[187]

Another cease-fire had been negotiated on May 21 and a provisional government established on September 3, 1965. General elections were held in the Dominican Republic in June 1966. A gradual withdrawal of the Inter-American Force began the following month[188] and was completed by September 21, 1966.[189]

There was heated debate in the Security Council of the United Nations over the legality of the OAS Force in the Dominican Republic. Soviet and Cuban representatives characterized the action as an il-

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[185]220 U.N. SCOR (Mtg. 1202), at 7-9, *reprinted in* 52 Dep't St. Bull. 862-63 (1965).
[186]*Id.*
[187]Meeker, *supra* note 171, at 63.
[188]Nanda, *supra* note 109, at 440.
[189]Sohn, *supra* note 170, at 401.

legal enforcement action prohibited by Article 53[190] of the Charter because it was without authorization from the Security Council.[191]

Goodrich, Hambro and Simons, in their treatise on the Charter, summarized the debate as follows:

> The question of the meaning of 'enforcement action' came up again during Security Council consideration of the Dominican crisis in May and June, 1965, specifically in connection with the report received of the establishment of an Inter-American Force by the resolution of May 6 of the Tenth Meeting of Consultation of Ministers of Foreign Affairs. The resolution provided that the Force should cooperate in the establishment of normal conditions in the Dominican Republic. The Soviet representative took the position that this constituted enforcement action in violation of Article 53. The United States held that the action being taken by the OAS in the Dominican Republic was 'most certainly not enforcement action,' any more than action taken by the United Nations in Cyprus, Congo, or the Middle East. In the Council discussion, one representative pointed out that the expression 'enforcement action' presupposed the existence of something to be enforced, and that consequently enforcement of a recommendation, as contained in the OAS resolution, was a contradiction in terms. He also stressed that the OAS was carrying out a conciliatory mission, its forces were not there in support of any claim against the state, and its function was that of pacific settlement under Article 52 and not that of enforcement under Article 53. *This appears to have been the view of the majority of Council members.*[192]

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[190]Article 53 of the United Nations Charter provides:

> 1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.
>
> 2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

[191]20 U.S. SCOR (Mtgs. 1220, 1221) (1965).

[192]L. Goodrich, E. Hambro, & W. Simons, Charter of the United Nations 366-67 (1969) (emphasis added).

The legality of the Grenada intervention under the doctrine of regional peacekeeping will now be examined by reference to the pertinent parts of the Charters of the United Nations, Organization of American States, and Organization of Eastern Caribbean States.

B. REGIONAL PEACEKEEPING UNDER THE UNITED NATIONS CHARTER

Chapter VIII of the United Nations Charter deals with "Regional Arrangements." Article 52 of that chapter allows the existence of regional arrangements for "dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action."[193] However, the regional arrangements and their activities must be "consistent with the Purposes and Principles

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[193]Article 52 of the United Nations Charter provides:

> 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purpose and Principles of the United Nations.
>
> 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
>
> 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
>
> 4. This Article in no way impairs the application of Articles 34 and 35.

of the United Nations."[194] Article 53 mandates that the Security Council "utilize such regional arrangements . . . for enforcement action under its authority," but the enforcement action taken by regional arrangements must be authorized by the Security Council.[195]

Thus, a regional action must be consistent with the purposes and principles of the Charter and must not be an "enforcement action" unless authorized by the Security Council. Restoring order and self-determination in a setting of breakdown of authority appears to be consistent with the "realist view" of primary purpose of the Charter of maintaining peace in the world under the conservative view and at the same time protecting human rights.[196]

The precedent of the Security Council's actions in the Dominican Republic Crisis is that an action such as the Grenada intervention, if taken by the appropriate regional organization, is not an "enforcement action" which requires Security Council authorization. This conclusion can be buttressed by the decision of the International Court of Justice in the case of *Certain Expenses of the United Nations.*[197] In that case, the court held that peacekeeping actions, which were not directed against a state, but were at the invitation of the government, were not "enforcement action" under the Charter.[198]

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[194]The purposes and principles of the United Nations are set forth in Article 1 of the Charter as follows:

> The Purposes of the United Nations are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

[195]*See supra* note 190 for the text of Article 53.
[196]*See supra* note 103 & accompanying text.
[197]1962 I.C.J. 151.
[198]Moore, *supra* note 12, at 155.

In addition to the criteria above, to be consistent with the Charter, the action must also be consistent with the Charter of the Organization of the American States.

C. REGIONAL PEACEKEEPING UNDER THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES CHARTER

The OAS Charter contains two articles that specifically prohibit intervention. Article 18 states that neither a single state nor a group of states "has the right to intervene, directly or indirectly, for any reason whatever," in the affairs of another state. This principle prohibits "not only armed force but also any other form of interference or attempted threat" against a state.[199] Article 20 proclaims that "[t]he territory of a is State inviolable" and adds that "it may not be the object even temporarily, of military occupation or of other measures of force taken by another state, directly or undirectly on any grounds, whatever."[200]

These seemingly absolute prohibitions are qualified by two additional articles on the OAS Charter. Article 22 states: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 18 and 20."[201] Article 28 of the Charter provides that if the inviolability, territorial integrity, sovereignty or political independence "of any American State should be affected by an armed attack" or any lesser situation "that might endanger the peace of

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[199]Article 18 of the OAS Charter provides:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

[200]Article 20 of the OAS Charter provides:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

[201]Article 22 of the OAS Charter provides: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 18 and 20."

America," the American States, either as a measure of solidarity or as a measure of collective self-defense, "shall apply the measures and procedures established in the special treaties on the subject."[202]

The phrase "existing treaties" in Article 22 could be construed to mean only those treaties that were in existence at the time of the 1967 revision of the OAS Treaty. This conclusion, however, would not be in accordance with drafting history of the Charter, nor would it be consistent with the equally authentic Spanish, Portugese, and French texts, all of which translate the phrase as "treaties in force" rather than "existing treaties."[203]

Thus, if the Grenada intervention was in accordance with and taken under the Organization of Eastern Caribbean States Charter, it is excepted from prohibition on intervention of Articles 18 and 20 of the OAS Charter, as maintaining peace and security in accordance with a "treaty in force."[204]

D. THE ORGANIZATION OF EASTERN CARIBBEAN STATES CHARTER

Article 3 of the OECS Charter sets up the purposes and functions of the Organization. In pertinent part it states that a major purpose of the Organization is "to promote unity and solidarity among the Member States and to defend their sovereignty, territorial integrity and independence."[205]

In pursuit of this purpose, the Organization endeavors "to coordinate, harmonize and pursue joint policies" for "Mutual Defense and Security" and for "[s]uch other activities calculated to further the purposes of the Organization as the Member States may from time to time decide."[206]

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[202]Article 28 of the OAS Charter provides:

> If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extracontinental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject.

[203]Moore, *supra* note 12, at 158.

[204]*See id.* at n.37: "It is significant that no OAS member state introduced a resolution on the Grenada mission during the OAS debate and the OAS took no action questioning compliance of the mission with the OAS charter."

[205]OECS Charter art. 3(1)(b).

[206]*Id.* arts. 3(2)(q), (r).

Article 4, setting out the powers of implementation, states:

> Member States shall take all appropriate measures, whether general or particular, to ensure the carrying out of obligations arising out of this Treaty or resulting from decisions taken by the institutions of the Organization.[207]

Article 6 establishes the "Heads of Government of the Member States" as "[t]he Supreme policymaking institution of the Organization," "responsible for, and hav[ing] the general direction and control of the performance of the functions of the Organization, for the progressive development of the Organization and the achievement of its purposes." These heads of government are called the "Authority."[208]

Article 6 further elaborates on the decision making authority and procedures of the Authority:

> The Authority shall have power to make decisions on all matters within its competence. All such decisions shall require the affirmative vote of all Member States present and voting at the meeting of the Authority at which such decisions shall have no force and effect until ratified by those Member States, if any, which were not present at that meeting, or until such Member States have notified the Authority of their decision to abstain. Such decisions by the Authority shall be binding on all Member States and on all institutions of the Organization and effect shall be given to any such decisions provided that it is within the sovereign competence of Member States to implement them.[209]

Article 6 also allows the Authority to make recommendations and give directions deemed "necessary for the achievement of the purposes of the Organization."[210]

The Charter also provides for coordinated action with non-member countries and grants the Authority final authority to conclude "treaties or other international agreements on behalf of the Organization and for entering into relationships between the Organization and . . . third countries."[211] In Article 16, the

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[207] *Id.* art. 4.
[208] *Id.* arts. 6(1), (4).
[209] *Id.* art. 6(5).
[210] *Id.* art. 6(6).
[211] *Id.* art. 6(8).

Organization is further commanded to "seek to establish such relations with . . . other countries as may facilitate the attainment of its purposes."[212] To accomplish this end, "the Organization, may conclude formal agreements or establish effective working relationships with . . . governments of other countries."[213]

Article 8 of the Charter deals with the Defense and Security Committee. This committee is a subordinate committee of the Authority, with responsibilities for advising the Authority on any matter referred to it by the Authority."[214] The Defense and Security Committee has the power "to make recommendations to the Authority" and is responsible for advice to the Authority "on matters relating to external defense and on arrangements for collective security against external aggression."[215]

Although the thrust of this Article of the Charter is defense against external threats, it is important to note that the decision to send a peacekeeping force into Grenada was not based upon a recommendation of the Defense and Security Committee. Rather, it was a decision of the Authority, based upon its broad powers in dealing with both internal and external affairs.[216] Additionally, the decision of the Authority was in effect ratified by the Governor-General of Grenada by his request for assistance from the OECS.[217] Finally, the members of the OECS are the most competent to interpret their Charter and they saw no authority problem for their collective action in Grenada.[218]

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[212] *Id.* art. 16.
[213] *Id.* art. 16(1).
[214] *Id.* art. 8.
[215] *Id.* art. 8(3).
[216] Moore, *supra* note 12, at 164.
[217] "The role of the Governor-General is significant in the British Commonwealth system and can be particularly important in settings of breakdown of authority or national emergency." J. Moore, Law and the Grenada Mission 52 (1984). Professor Anthony P. Maingot concurred in this assessment in his testimony before the U.S. House of Representatives, Foreign Affairs Committee hearings on Grenada, stating that

> there has been an extraordinary ignorance of the British Westminister model in all the discussions in the American newspapers with no attempt, as I see it, to clarify the problem either. A lot of assumptions have been made that the Governor-General Sir Paul Scoon was taking on powers unconstitutionally which he certainly was not. He had the powers. The big mystery I raised, was why the Marxist-Leninsts kept him on at all as Governor-General. I can only assume that it was part instrument for the time being. But by doing that, in a way—thank God—they left a standing authority.

House Hearings Grenada, *supra* note 49, at 204-05.

[218] Moore, *supra* note 12, at 164.

E. CONCLUSIONS ON REGIONAL PEACEKEEPING

The increasing role played by regional organizations in maintaining peace within their chartered boundaries has resulted from necessity. The United Nations Security Council has demonstrated an inability to effectively deal with localized outbreaks of violence that require timely response. Until the Security Council acts, the appropriate regional organization can and must act to keep peace within the region. This action is crucial if the fundamental purposes of the United Nations Charter, promoting peace and human rights, are to be effectively pursued.

The Grenada intervention serves as an excellent example of the effectiveness of a regional organization in a peacekeeping role. The necessity for action was quickly perceived. The capabilities of the organization were assessed and additional help was requested for a proportional response. The decision to intervene was given further legal support by the request from the Governor-General of Grenada. The operation occurred with a minimum of casualties and was welcomed by the vast majority of the Grenadian people. The outcome was a restoration of peace, human rights, and the right of self-determination from a setting of chaos, violence, and a breakdown of governmental authority. As such, the action was consistent with the "Purposes and Principles of the United Nations" and thereby lawful under the Charter.

VI. SELF-DEFENSE

A. INTRODUCTION

Professor Rostow wrote the following in an opinion editorial in the *New York Times:*

> Like the Cuban missile crisis, the invasion of Grenada must be viewed in the broader context of Soviet-Cuban Caribbean policy. The United States and many other nations have long perceived the development of the Soviet-Cuban base on Grenada with grave concern. For Grenada's island neighbors, the brutal murders of Prime Minister Maurice Bishop and some of his colleagues converted that concern into panic. They saw the course of events in Grenada as an immediate threat, and asked the United States to help defend themselves. Their request

> reinforced the independent legal right of the United States to eliminiate the impending deployment of a hostile force on a large scale on Grenada.[219]

Professor Rostow's conclusions raise certain issues of the customary law doctrine of self-defense as applied to the Grenada intervention.

B. THE UNITED NATIONS CHARTER FRAMEWORK

Articles 2(3) and (4) and Article 51 of the United Nations Charter establish the world legal order by codifying the pre-existing customary law concerning aggression and self-defense.[220] Article 2(3) states that members must settle international disputes through "peaceful means in such a manner that international peace and security are not endangered." Article 2(4) proscribes "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Article 51 of the Charter qualified these articles by incorporating the customary law doctrine of self-defense. In part, it states that the Charter does not "impair the inherent right of individual or collective self-defense if an armed attack occurs, against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."

As previously discussed, many legal scholars have given Article 51 a restrictionist construction.[221] This view limits the right of self-defense to situations where an actual armed attack has occurred on a state.[222] The inadequacies of this restrictive construction and rational alternatives in interpretation have been thoroughly discussed by Professor McDougal and Mr. Feliciano:

> In the first place, neither Article 51 nor any other word formula can have, apart from context, any single 'clear

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[219]Rostow, *Law "Is Not a Suicide Pact"*, N.Y. Times, Nov. 15, 1983, at A35, cols. 1-3.

[220]W. Mallison & S. Mallison, Armed Conflict in Lebanon, 1982: Humanitarian Law in a Real World Setting 13 (1983). *See supra* notes 99 (text of Article 51) & 120 (text of Article 2).

[221]*See supra* notes 95-102 & accompanying text.

[222]Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, in W. Mallison & S. Mallison, Studies in the International Humanitarian Law of Armed Conflict 42, 68 (rev. prelim. ed. 1982); Mallison & Mallison, *supra* note 220, at 13.

> and unambiguous' or 'popular, natural and ordinary' meaning that predetermines decision in infinitely varying particular controversies. The task of treaty interpretation, especially the interpretation of constitutional documents devised, as was the United Nations Charter, for the developing future, is not one of discovering and extracting from isolated words some mystical pre-existent, reified meaning but rather one of giving that meaning to both words and acts, in total context, which is required by the principal, general purposes and demands projected by the parties to the agreement. For determining these major purposes and demands, a rational process of interpretation permits recourse to all available indices of shared expectation . . ..[223]

One authoritative source for interpreting the Charter is its negotiating history at the San Francisco Conference.[224] This history reveals that Article 51 was intended to incorporate the entire customary law or "inherent right" of self-defense, to include the doctrine of anticipatory self-defense, which is an integral part of the customary law.[225] Additionally, the equally authoritative French text of the negotiating history employs the term "aggression armee," which, while encompassing the conception of "armed attack," is not limited thereto.[226]

C. THE UNITED NATIONS DEFINITION OF AGGRESSION

On December 14, 1974, the General Assembly adopted without negative vote a definition of aggression. This definition constitutes the most authoritative formulation of community criteria concerning the prohibition of aggression. The definition also takes into account the Charter rights of self-defense, incorporating the customary law of self-defense.

Article 6 of the Definition of Aggression states: "Nothing in this Definition shall be construed as in any way enlarging or diminishing

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[223]M. McDougal & F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 234 (1961).

[224]Article 32 of the Vienna Convention of the Law of Treaties provides that the *travaux preparatories* are a primary source in interpreting ambigious terms in treaties.

[225]Mallison & Mallison, *supra* note 220, at 13; Mallison, *supra* note 222, at 69.

[226]Mallison & Mallison, *supra* note 220, at 13-14.

the scope of the Charter, including its provisions concerning cases in which the use of force is lawful."[227]

D. THE LEGAL REQUIREMENTS FOR SELF-DEFENSE

The international law which distinguishes self-defense from aggression and sets forth principles governing both has developed over a considerable period of time.[228] "The objective of these legal doctrines is to ensure freedom from coercion and to protect the inclusive interests or values of all states and people in promoting peaceful settlements of international disputes and deterring acts of aggression."[229]

There are three requirements in customary international law for the application of the doctrine of self-defense. The first requires that peaceful procedures be used, if available. The second requirement is that of a necessity, as opposed to a show or pretense, for use of force in responding to coercion. The last requirement is proportionality; the responding coercion must be proportional to the original coercion.[230]

In addition to these three basic requirements, there are a number of appraisal criteria which develop the contextual setting of the basic requirements.[231] These factors will be applied to the Grenada intervention.

E. ANTICIPATORY SELF-DEFENSE

Anticipatory self-defense is a part of the customary law doctrine of self-defense. Because of the lack of overt initiating coercion, its requirements for necessity and proportionality have traditionally been more vigorously applied than in the case of an actual armed attack.[232] Three examples of anticipatory self-defense illustrate this customary international law doctrine.

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[227]29 U.N. GAOR Supp. 31, at 142, U.N. Doc. No. A/9633 (1974).

[228]Mallison & Mallison, *supra* note 220, at 16.

[229]*Id.*

[230]McDougal & Feliciano, *supra* note 223, at ch. 3; Mallison & Mallison, *supra* note 220, at 16; Mallison, *supra* note 222, at 62.

[231]McDougal & Feliciano, *supra* note 233, at 167-90; Mallison & Mallison, *supra* note 220, at 16; Mallison, *supra* note 222, at 63.

[232]Mallison & Mallison, *supra* note 220, at 16.

1. The Caroline Incident

This classic example of anticipatory self-defense involved a United States steamer on the Niagara River during the Canadian insurrection of 1837. A large number of Americans and Canadians were camped on the Canadian side of the border with the apparent intention of aiding the rebels.[233] The steamer, the *Caroline,* was being used to transport more men and supplies from the American side to Canada. The British government apparently expected that the United States government would stop this aid. When this did not occur, the British sent troops across the river, who boarded the *Caroline,* set it afire and sent it over Niagara Falls. Two Americans guarding the vessel were killed in the fight. Following the attack, the troops returned to Canada without any further military action.[234]

The United States protested the British action. The British government replied that the *Caroline* was acting in a piratical capicity, that American law was not being enforced along the border, and that the destruction was an act of necessary self-defense.[235]

In 1841, a man boasted that he had taken part in the incident. He was arrested and tried for murder in New York. Thereupon, the British government admitted responsibility for the *Caroline*'s destruction and demanded that the man be released. Secretary of State Webster and Lord Ashburton finally reached an agreement that disposed of the case in 1842. Secretary Webster admitted that the employment of force might have been justified by self-defense, but denied that there had been the requisite necessity in the incident. Lord Ashburton apologized for the invasion of American territory, but maintained that circumstances did afford a proper excuse.[236] In his note of August 6, 1842, Webster wrote:

> [R]espect for the inviolable character of the territory of independent states is the most essential foundation of civilization . . .. Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'[237]

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[233]J. Bishop, International Law, Cases and Materials 916 (3d ed. 1971).
[234]Brierly, *supra* note 69, at 405; Mallison & Mallison, *supra* note 207, at 17.
[235]Bishop, *supra* note 233, at 917.
[236]*Id.*
[237]*Id.*

As stated by Professor Mallison, this oft quoted formulation

> was probably unrealistically restrictive when stated . . . and [i]n the contemporary era of nuclear and thermo-nuclear weapons and rapid missile delivery techniques, Secretary Webster's formulation could result in national suicide if it actually were applied instead of merely repeated.[238]

2. Destruction of a Part of the French Fleet

A twentieth century example of anticipatory self-defense recognized by international law occured during World War II. Following the surrender of the Vichy government of France to Germany in June 1940, many of the ships of the French Navy took refuge in ports in Egypt, North Africa, and Martinique in the West Indies. In early July, the British presented three alternatives to the French naval commanders. The first encouraged the French Navy to join forces with the British in the war with Germany. The second would allow refitting of the French ships for non-combative use. The last, and the alternative which British hoped would not be necessary, was that if no other satisfactory way could be obtained to insure that the French Navy did not fall into the hands of Germany, the ships would be attacked and sunk. The French Navy in Egypt and Martinique accepted the second alternative. In North Africa, the French naval commander refused to cooperate and, after further negotiations, British naval and air forces attacked and neutralized the French fleet in North Africa.[239]

Noted legal scholars have appraised the British action as a lawful example of anticipatory self-defense. The necessity for the British action is clear; British air and naval forces were the primary force countering a German invasion of the British Isles. The addition of the French Navy to the German forces was an unacceptable threat. International law did not require the British to wait until the French fleet was made an actual part of the German military forces before staging the attack.[240]

3. The Cuban Missile Crisis

The Cuban Missile Crisis[241] of 1962 provides examples of anticipatory self-defense and collective anticipatory self-defense in a

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[238]Mallison, *supra* note 222, at 55.
[239]Mallison & Mallison, *supra* note 220, at 17.
[240]*Id.*
[241]Mallison, *supra* note 222, is a valuable source on the Cuban Missile Crisis and much of this section's analysis is derived from it.

nuclear context.[242] Intercontinental missiles and launching sites were being emplaced in Cuba by the Soviet Union, in secret and over strong denials by the Soviet Union that such activity was taking place. This secret activity was revealed by United States photo reconaissance aircraft.

The Soviet activity was in the face of prior diplomatic discussions during which the United States had stated its opposition to the emplacement of offensive nuclear weapons in this hemisphere; therefore, further diplomatic means were not deemed feasible. Because of the drastic effect on the balance of nuclear power in the world created by the Soviet's actions in Cuba, some international lawyers argued that bombing the missile sites was legally justified.[243] President Kennedy instead chose a limited naval blockade or quarantine-interdiction against the import of further offensive weapons into Cuba and to bring about the removal of those weapons already in Cuba. This limited use of force had two advantages. First, it allowed for the further use of diplomatic means at the United Nations and elsewhere. Second, it reserved the option of escalating the responding coercion short of nuclear or conventional war.[244] The ultimate result was the Kennedy-Khruschev agreement which ended the crisis and led to the withdrawal of the missiles from Cuba.[245]

On October 23, the day after President Kennedy announced the quarantine-interdiction, the Organ of Consultation of the Organization of American States invoked collective self-defense on behalf of the Inter-American Community. The regional organization, based on the same facts, reached the same conclusion as the United States as to the actual necessity for anticipatory self-defense. The Organization also approved and later participated in the quarantine-interdiction. In addition to the OAS approval, the quarantine-interdiction met with wide approval within the United Nations.[246]

F. COLLECTIVE SELF-DEFENSE

As can be seen from the world reaction to the Cuban Missile Crisis, collective self-defense is recognized in international law. In addition to the three basic requirements of self-defense discussed above, the collective action should be analyzed with the additional specific requirements previously mentioned.

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[242] *Id.*
[243] Mallison & Mallison, *supra* note 220, at 18.
[244] Mallison, *supra* note 222, at 93-101.
[245] *Id.* at 49-50.
[246] Mallison & Mallison, *supra* note 220, at 18-19.

1. Characteristics of the Participants.[247]

This criterion involves factual descriptions of the participants whose applications of initiating coercion and coercion used in claimed self-defense are the subject of the community policies and doctrines concerning lawful self-defense.[248]

The participants in the Grenada intervention were the United States, the members of the Organization of Eastern Caribbean States, Jamaica, and Barbados. The United States is a superpower, while the other nations are, by world standards, very small and weak. The antagonists were Grenada or, more precisely, the remnants of the New Jewel Movement, Cuba, and, indirectly, the Soviet Union and other communist bloc countries. It should be noted that the armed forces in Grenada were larger than the combined armed forces of the other member states of the OECS. There was also a large and well-armed contingent of Cubans on Grenada. The Soviets and other communist bloc countries were supplying large quantities of materials and providing training support.

2. Objectives of the Claimants[249]

The relevant objectives of the participant claiming self-defense may be appraised in terms of conservation or extension of values, the degree of consequentiality involved, and the inclusive or exclusive character of the objectives.[250]

(a) Inclusive or Exclusive

The joint security force was acting on behalf of the entire Western Hemisphere in the sense of preventing a base for further Cuban-Soviet expansion in Central and South America.

(b) Conservation or Extension

The mission of the joint security force did not include an extension of their power values in Grenada. Self-determination through elections and a restoration of peace in the area were the primary goals of the force. This can be contrasted with Cuban and Soviet goals of expanding their influence in the area. "There is no reason to doubt the dedication of the political elite of the Soviet Union to the objective of establishing a world order under law providing that it is remembered that the method is military power and the objective is a world order of totalitarianism."[251]

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[247]McDougal & Feliciano, *supra* note 223, at 222.
[248]Mallison, *supra* note 223, at 63-67.
[249]McDougal & Feliciano, *supra* note 223, at 222.
[250]Mallison, *supra* note 222, at 64.
[251]*Id.* at 65.

(c) Requisite Consequentiality of Values Conserved

Peace and a right of self-determination were restored to the Grenadian people from a setting of chaos and increasing totalitarian control. From the perspective of the small island neighbors of Grenada, the threat of a large military buildup, backed by Cuban and Soviet encouragement and advice, was eliminated. From the perspective of the Western Hemisphere, a Cuban base of operations, from which further expansionism could be staged, was eliminated.

3. Quantum of Responding Coercion[252]

The military methods employed by those claiming self-defense are relevant to a determination of the proportionality of the response. One of the primary goals of the joint security force was accomplishing their mission with minimum casualties and destruction of property. The mission employed forces that would allow them to successfully secure the island and its foreign and native inhabitants. There were no alternative methods that would adequately insure the safety of the foreign citizens and the Grenadian populace on the island. Diplomatic efforts had failed to insure the safety of these people. Thus, a military intervention was proportional to the threat posed to foreign and Grenadian citizens and the size of the force was proportional to their peacekeeping role.

4. Conditions and the Reasonableness of the Expectation of Necessity [253]

All of the conditions of the world power process are relevant in determining the legal character of the initiating coercion as well as the legal character of the claim to responding self-defense.[254] Professor Mallison wrote the following comments relating to the Soviet Union during the Cuban Missile Crisis. They are equally applicable today, especially considering the expanding role of Cuba as agent for the Soviets in this hemisphere:

> As applied to the Soviet Union in the present fact situation, it is appropriate and lawful for the United States to evaluate the aggressive characteristics of the World Communist movement led by the Soviet Union. The United States may consider, for example, conditions as demonstrated by the extension of the Soviet Union's

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[252]McDougal & Feliciano, *supra* note 223, at 228-29, 241-44.
[253]*Id.* at 229-30, 218.
[254]Mallison, *supra* note 222, at 66.

> power and system to Czechoslavakia, Hungary, and a large part of central Europe. The entire pattern of operations of the Soviet Union in the world community since the victorious conclusion of the Second World War affords responsible decision-makers of the United States Government the opportunity, and indeed the obligation, to examine the Soviet offensive military move into the Western Hemisphere in the large context of Soviet objectives and practices, including its demanded totalitarian public order system.[255]

The most important condition which must be appraised in application of community criteria is the degree of necessity which forms the basis of the claim to use coercive self-defense. The central point is that self-defense may be employed when the invoking participant reasonably expects that military force as an instrument of national policy must be used to preserve the participant's physical integrity and continued existence as an effective participant in the world community processes.[256]

In applying this criterion to the Grenada intervention, the factual context that relates to the necessity of the intervention from the standpoint of self-defense must be isolated from the factual context which bears on other potential claims for intervention. When this has been done, a claim of anticipatory self-defense as a justification for intervention in Grenada falls short of the requisite necessity. There was no overt threat to the existence of any of the participants in the joint security mission. There was a potential that such a threat would be present in the future but the threat was not imminent. One source of a threat to the region has been claimed to have been the enlargement of the runways at the Port Salines Airport. As Professor Mallison stated in an article written during the Cuban Missile Crisis: "[I]nitiating coercion [such as Soviet medium range bombing aircraft based in Cuba] would provide lawful authority for the use of responding military power in self-defense."[257] There is a significant distinction in the factual context of the Grenada intervention and the situation posed by Professor Mallison. There were no bombers stationed in Grenada. The airport where they might have been stationed was under construction. There was ample time before the completion of the airport and the introduction of any military aircraft to employ less coercive measures to the potential threat posed by the Port Salines Airport.

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[255] *Id.*
[256] *Id.* at 66-67.
[257] *Id.* at 67.

Another threat was posed to Grenada's neighbors by the buildup of Grenada's military force. The buildup alone, however, without evidence of imminent aggressive intentions, is insufficient justification for a preemptive intervention to neutralize this threat. Less coercive measures could have been effectively employed to guard against a threat of this nature.

Based upon this lack of necessity, the participants in the Grenada intervention had insufficient basis for a valid claim of anticipatory self-defense.

VII. A COMPARISON OF THE GRENADA INTERVENTION TO THE SOVIET INTERVENTION IN AFGHANISTAN

A. INTRODUCTION

In the aftermath of the Grenada intervention there have been numerous comparisons of this action with the 1979 Soviet intervention in Afghanistan. Though opinions vary, the center of this controversy is a comparison of values of the two super-powers of the modern world community.[258]

This section will make a comparative analysis of the two interventions. Initially, an overview of the Soviet philosophy of international law will be given. The factual context of the intervention and the Soviet claims will be listed, followed by an analysis of the Soviet claims. The section concludes with a comparison of the two interventions in light of the conclusions reached in this and the preceeding sections of the article.

B. AN OVERVIEW OF THE SOVIET PHILOSOPHY OF INTERNATIONAL LAW

"The Soviet attitude toward law has evolved from an initial suspicion and rejection of what was regarded as an essential bourgeois in-

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[258] "The game being played in many circles throughout the world, comparing American participation in the intervention in Grenada with the Soviet invasion of Afghanistan, is not just a new version of apples and oranges. It is a saddening effort to equate Soviet and American values." Opinion editorial by Theodore L. Eliot, Jr., Dean of the Fletcher School of Law and Diplomacy, Tufts University, Wall Street Journal, Nov. 7, 1983, at 34, col. 3. *See also* N.Y. Times, Oct. 29, 1983, at A1, col. 4; N.Y. Times, Oct. 30, 1983, at D2, col. 2; N.Y. Times, Oct. 28, 1983, at A27, col. 1; Christian Science Monitor, Nov. 1, 1983, at 22, cols. 2-3; House Hearings Grenada, *supra* note 49, at 12 (testimony of Deputy Secretary of State Dam).

stitution, anathema to the revolution, to a realization that law can be a useful implement in the execution of regime policies."[259] Stalin began this domestic policy in the mid-1930s and Khrushchev continued this policy on the international level. "Peaceful coexistence" was Khrushchev's formulation and, in 1956, he began a campaign to have this concept accepted as contemporary international law. The formulation of the doctrine was innovative for the Soviets in that it attempted to restructure the international legal order around the interests of the Soviet Union.[260]

The law of peaceful coexistence is divided into two fundamental principles, peaceful coexistence and socialist internationalism. The principle of peaceful coexistence applies to relationships with non-socialist states. It embodies the Soviet need in waging international class struggle with capitalist states. A principal Soviet concern is nuclear war, which is necessarily outlawed by peaceful coexistence. Revolutionary struggle, however, short of nuclear war and competition between the two camps is permitted. The principle of socialist internationalism governs relationships within the socialist camp, including socialist neutrals, and "provides a legal cover for Soviet hegemony by requiring that socialist states structure their domestic and foreign policies with special deference to the needs of the camp as a whole."[261] In effect, this principle places the Soviets in control of socialist-camp relationships and both principles of the law of peaceful coexistence are structured to further the interest of the Soveit Union in its relationships with both capitalist and socialist states.[262]

The substantive content of these two fundamental principles is general and open-ended, permitting flexibility to meet the needs of changing foreign policy and interests. Most formulations of the principle of peaceful coexistence are based upon the Sino-Indian Agreement of 1954 concerning Tibet. Its five principles are: "(1) mutual respect for territorial integrity and sovereignty, (2) nonaggression, (3) noninterference in internal affairs, (4) equality and mutual benefit, and (5) peaceful coexistence itself."[263]

These principles are supplemented further as the need arises with component principles such as peaceful settlement of disputes, self

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[259]Ramundo, *Czechoslovakia and the Law of Peaceful Coexistence: Legal Characterization in the Soviet National Interest*, 22 Stanford L. Rev. 963, 965 (1970) [hereinafter cited as *Peaceful Coexistence*].

[260]*Id.*

[261]*Id.*

[262]*Id.*

[263]*Id.* at 966.

determinations, disarmament, a prohibition against war propaganda, equality of nations, illegality of colonialism, the arms race, and the requirement that all states collaborate to eliminate interferences with peaceful coexistence. The inclusion of peaceful coexistence itself as a component principle is important because it provides a means of generating further substantive components when needed.[264]

The component principles have the outward color of contemporary international law, but their substantive content reflects their strong Soviet bias. An example is the component principle of self-determination. Under the Soviet concept of international law, states are recognized to possess a right to sovereignty, to territorial integrity, and to non-interference from external sources in their internal affairs. Socialist states are therefore legally protected from any expansionist encroachment by non-socialist states. But these protections are not reciprocal because capitalist states are nonprogressive and nonrepresentative of the true socialist interests of their citizens.[265]

Thus, under the Soviet theory of self-determination, the concept of "state," as understood in the West, is expanded and "state" recognition is extended to "progressive" (socialist-oriented) national liberation organizations. These organizations are said to represent the popular sovereignty of the suppressed masses. Furthermore, once recognized as a "state," the principles of peaceful coexistence entitle the liberation movement to socialist assistance to fight against capitalist interference with its sovereignty. Therefore, although the "popular" movement is occurring within the boundaries of a capitalist state, it is the capitalist state that is illegally interfering and not the external socialist forces of peace, who offer their mutual assistance and support to the new socialist state under the principle of socialist internationalism.[266]

Because it governs relations within the socialist camp, the principle of socialist internationalism is considered more progressive than the principle of peaceful coexistence. The progressive nature of the principle itself is used to meet the flexible needs of the regime and therefore there is no like-named component principle:

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[264]*Id.*

[265]J. Henriksen, International Claims to Anticipatory Self-Defense: A Juridical Analysis 41 (Sept. 30, 1981) (unpublished thesis available in the libraries of The National Law Center of The George Washington University and the University Library); B. Ramundo, Peaceful Coexistence: International Law in the Building of Communism 18-22 (1967).

[266]*Id.*

> Socialist internationalism is said to serve the national interests of individual socialist states as well as their collective interest in building communism, with primacy accorded the collective interest. The implicit requirement that sovereign prerogative defer to collective needs and interests is clearly stated in Soviet commentaries on socialist internalism.[267]

Like the principle of peaceful coexistence, the principle of socialist internationalism is open-ended. The lack of definitive formulation stems from the Soviet desire to create the concept of legal obligation to the collective social camp as it moves toward socialism under the guiding hand of the Soviet Union. Some of the components of the principles are voluntary association in the cause of building socialism and communism, equality, sovereignty, noninterference in internal affairs, territorial integrity, mutual advantage, and, the most flexible of tools, comradely mutual assistance. Like the principle of peaceful coexistence is to the Soviets international relations, socialist internationalism is a cosmetic device for the ordering of Soviet relationships within the Soviet bloc.[268]

In addition to the two fundamental principles of the law of peaceful coexistence, the Soviets endorse those principles of international law that meet their needs under a broader formulation of "general democratic principles." Those principles of international law that do not meet the needs of the Soviets are discarded as undemocratic. Thus, the Soviets have created their own framework for the international legal order. They have done so both by creating new norms and by selecting certain traditional norms for retention. Furthermore, the Soviets assert that the law of peaceful coexistence is part of contemporary international law because their ideology and current conditions dictate peaceful coexistence and, second, because the law of peaceful coexistence is embodied in the United Nations Charter. The West, recognizing the Soviet bias to the law of peaceful coexistence, has rejected the Soviet assertions.[269]

The Soviet invasion of Czechoslovakia in August 1968 is an example of the law of peaceful coexistence in action. The revisionist reform of the Dubcek government was stopped, replaced with a pro-Moscow regime, and Soviet legal specialists were put to work to create a legal rationalization. The Soviets needed support for frater-

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[267] *Peaceful Coexistence*, *supra* note 259, at 967.
[268] *Id.*
[269] *Id.* at 968.

nal assistance by intervention and force, while limiting the ability of the Western camp to employ similar means. The result was a double legal standard called the Brezhnev Doctrine.[270]

The Brezhnev Doctrine was an expansion of the more subtle implications of the law of peaceful coexistence to an overt double standard. The doctrine centers around Soviet policy and its rationalization. Resort to force in Czechoslovakia was based on a "just war" concept and on a broad claim that "resort to force in defense of the victories of socialism is permissible under the law of coexistence."[271] Thus, not only is the use of force justified against capitalist states, but also to preserve the integrity of the socialist camp.

The Soviet approach to sovereignty is also a double standard. Under that view, although the West is prohibited from interfering in the internal affairs of Socialist camp countries, it is the duty of the socialist camp to subordinate national interests to those of the collective interest. Sovereignty within the camp is qualified by the socialist modifier. Likewise, the principles of nonintervention and self-determination as specific aspects of sovereignty have been interpreted by the Soviets to permit intervention in the interest of socialism, as determined by the Soviets. Socialist states do not "intervene"; they render fraternal assistance to suppress the forces of counterrevolution. The right of self-determination is not infringed upon when dealing with counterrevolutionaries whose interests are contrary to the real interests of the people. In Czechoslovakia, the Soviets took this rationale a step further by characterizing "the occupation as active struggle for the right of self-determination of the people of Czechoslovakia"[272] and expanded this self-determination right to the whole socialist community, in terms of self-defense.[273] Socialist self-determination is thus self-determination qualified to fit the needs of the Soviets.

With each of the doctrines outlined above, the result is the same. The victory of socialism, under the Soviet approach to international law, is a one-way street. In non-socialist states, the people retain their right to exercise self-determination in favor of socialism, but in socialist states the right has already been irrevocably exercised. External intervention is permitted only by other socialist states for the common good of protecting socialism.[274]

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[270]*Id.* at 969.
[271]*Id.* at 972.
[272]*Id.* at 976.
[273]*Id.*
[274]Henriksen, *supra* note 265, at 45-46.

C. BACKGROUND OF THE AFGHANISTAN INTERVENTION

The events that led to the Soviet intervention in Afghanistan began on April 27, 1978, when a Soviet-supported military *coup* succeeded in overthrowing Afghan President Daoud. Two weeks later, a new revolutionary council named Nur Mohammed Tacaki as chairman and Prime Minister, and proclaimed the Democratic Republic of Afghanistan. At this time, there were two factions to the Communist Party in Afghanistan. Taraki was head of the nationalistic Khalq faction and Babrak Karmal, the Deputy Prime Minister, led the more doctrinaire Parcham faction. After the *coup*, when the Khalq faction was able to gain control of the new government, a number of Parcham leaders, including Karmal, were effectively exiled by being appointed as ambassadors to other countries.[275]

On December 5, 1978, the new revolutionary government concluded a twenty-year treaty of "Friendship, Good Neighborliness and Cooperation" with the Soviet Union. Article 4 of this treaty stated: "The high contracting parties . . . shall consult each other and take by agreement appropriate measures to ensure the security, independence, and territorial integrity of the two countries."[276]

In March 1979, Hafizullah Amin, an American-educated Khalq leader and the former Foreign Minister, replaced Taraki as Prime Minister. Taraki was made President, while retaining his positions as Chief of the Party and Commander of the Army. Amin initiated a series of iconoclastic domestic policies which provoked a popular rebellion that spread throughout Afghanistan during the spring and summer of 1979. During the disorders, the Soviets, in accordance with previous agreements, began an extensive build-up of the Afghan military forces.[277]

In August 1979, a Soviet military delegation was sent to Afghanistan to assess the state of the insurgency and recommend the Soviet course of action. The unfavorable report delivered to the

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[275]Cong. Research Service, Report for the House Comm. on Foreign Affairs, *Soviet Policy and United States Response in the Third World*, 97th Cong., 1st Sess. 85 (Comm. Print 1981) [hereinafter cited as *CRS Report*]; Office of Senior Specialists, Cong. Research Serv., Report prepared for the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs, *An Assessment of the Afghanistan Sanctions: Implications for Trade and Diplomacy in the 1980's*, 97th Cong., 1st Sess. 15 [hereinafter cited as Afghan. Sanctions Report].

[276]Afghan. Sanctions Report, *supra* note 275, at 15.

[277]*Id.*

Soviet leadership is believed by American specialists to have played a significant role in the Soviet decision to launch a full-scale military intervention.[278]

On September 15, 1979, Taraki was killed in an attempt to overthrow Amin. Taraki had just returned from the Non-Aligned Conference in Cuba, after which he had stopped in Moscow to confer with Soviet Premier Brezhnev. Thus, it is speculated that the attempted *coup* was with the concurrence of the Soviet Union, if not by their orders. It is believed that Amin had "fallen into Soviet disfavor because he was too independent minded, strong willed and wary of Soviet intentions in Afghanistan. But, perhaps most important from the Soviet view, he was not succeeding."[279]

Nonetheless, the Soviets publicly supported Amin after the failed *coup* and continued their military aid to Amin's vigorous efforts to stop the rebellion. The rebellion in Afghanistan was partly linked to the Islamic revolution in Iran and, when the situation in Iran intensified with the seizure of the American Embassy in November 1979, the Soviets apparently decided that it was time to act.[280]

On December 8-9, 1979, a small contingent of Soviet troops was airlifted into Kabul. The major portion of the operation began on December 24 and continued until December 27. During that period, 5,000 airborne troops were airlifted into Afghanistan. On December 27, Amin was overthrown, tried, and executed by a new Soviet-imposed regime led by Karmal, who, with certain other of the "exiled" Parcham leaders, had been flown to Kabul by the Soviets. The Soviet forces in Afghanistan rapidly grew to 100,000 after the initial intervention; as of August 11, 1984, the Soviet forces remain at that strength in Afghanistan.[281]

D. THE SOVIET JUSTIFICATION FOR THE INTERVENTION

The first authoritative public explanation for the intervention by the Soviets appeared in their state newspaper, *Pravda*, on December 31, 1979. The article gave the following explanation of the Soviet motives for intervening in Afghanistan:

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[278] *Id.*

[279] *CRS Report*, *supra* note 275, at 85-86.

[280] *Id.* at 86; *Afghan. Sanctions Report*, *supra* note 275, at 13, 15. *But see Afghan Sanctions Report*, *supra* note 275, at 17.

[281] *CRS Report*, *supra* note 275, at 86.

— in a background commentary, the article described the "profound transformations" that had taken place since the April revolution in which the socioeconomic base of Afghan society had been restructured and the principles of socialism established;

— in countering these changes, the "external imperialist forces formed a direct collusion with the internal counterrevolutionary forces" in order "to push Afghanistan off the chosen road";

— the internal reactionaries were "receiving actually unlimited backing from the imperialist circles of the United States, the Beijing [Peking] leaders, and governments of some other countries that were lavishly supplying the counterrevolutionary gangs with weapons, equipment and money";

— the article linked the United States with a broad range of subversive activities in association with Pakistan, China, and Egypt that were directed against the Kabul regime;

— the Soviet Union, hoping that the "imperialist" side would face "realities" and exercise restraint, nevertheless "made no secret that it will not allow Afghanistan's being turned into a bridgehead for preparation of imperialist aggression against the Soviet Union.";

— "external imperialist reaction" made "continuous efforts" to undermine the state power organs and ruling party, and in that effort found an ally in Amin who "in actual fact teamed up with the enemies of the April revolution" to threaten "the democratic order";

— patriotic forces, however, "rose not only against foreign aggression but also against the usurper" to restore "revolutionary law and order";

— under these circumstances, the Afghan government "made again an insistent request that the Soviet Union should give immediate aid and support in the struggle against external aggression";

— the Soviet government, acting under the terms of

> Article 4 of the 1978 Soviet-Afghan friendship treaty and Article 51 of the U.N. Charter sanctioning self-defense, granting this request, sent in a "limited Soviet military contingent" to be used "exclusively for assistance in rebuffing the armed interference from the outside" and would be "completely pulled out of Afghanistan when the reason that necessitated such an action exists no longer";
>
> — the Soviet Union gave and "is giving" Afghanistan "various economic, scientific and technical and other assistance," helping it embark upon the "construction of a new society," and explaining, "to deny Afghanistan the assistance which it has asked for now would mean to cross out the entire experience of our good and honest cooperation with that country, to leave Afghanistan alone to face the imperialist forces that are determined to deprive the Afghan people of the opportunity to enjoy their rights and freedoms to the full extent."[282]

On January 12, 1980, Soviet Premier Brezhnev issued his first public statement on the Afghanistan intervention. He re-emphasized the rationale of the *Pravda* article, adding special attention to the United States' responsibility for counterrevolutionary activities in Afghanistan and Soviet innonence of any wrongdoing. He also reiterated the "Bridgehead theory," stating that outside intervention, other than Soviet, had "created a real danger of Afghanistan losing its independence and being turned into an imperialist military bridgehead on our country's southern border." Brezhnev stressed that the action in Afghanistan was not part of a Soviet plan of expansion because the "policy and mentality of colonialism are alien to us."[283]

In essence, the Soviet rationale for their intervention into Afghanistan is thus founded on a request for intervention from the Afghan government and anticipatory self-defense of both the Soviet Union and Afghanistan.

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[282] *CRS Report, supra* noe 275, at 87.
[283] *Id.* at 88-89.

E. ANALYSIS OF THE SOVIET CLAIMS

1. The Request Claim

The Soviets have relied on a request to intervene on frequent occasions prior to the Afghanistan intervention. In each instance, the claim has been highly suspect.

In 1940, the Soviets invaded Finland at what they claimed was the request of the Finnish government. However, the government, upon whose request the Soviets relied, was not the government located in Helsinki and recognized by the rest of the world. According to the Soviets, that government had abondoned the true socialist interests of its people. Consequently, the Soviets recognized a more "progressive" government in the north, it was that "government" who had requested Soviet intervention.[284]

In 1956, the Soviets intervened in Hungary with a force of 200,000 troops. The request for intervention did not come from the liberal communist government of Imre Nagy, the government recognized by the world community. The request was from, in the Soviets' view, the "more representative" counter-government of Janos Kadar.[285]

The 1968, Soviet intervention in Czechoslovakia was initially claimed to have been by invitation,[286] despite the fact that Alexander Dubcek, the recognized head of the Czechoslovakian government, was taken to Moscow after the intervention. It was only at that time that he signed an agreement "accepting" military "assistance."[287] The Soviets persisted with this invitation claim in the United Nations until even the government of Czechoslovakia denied its existence.[288]

Thus, under the Soviet view of international law, a request for intervention need not preceed the intervention. It also need not come from the government recognized by the world community. The request "need not even be documented and provable because, under Soviet socialist ideology, the invitation is a standing one; it may be presumed.[289]

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[284]Henriksen, *supra* note 265, at 39.
[285]*Id.*
[286]Miller, *Collective Intervention and the Law of the Charter, reprinted in* 62 U.S. Naval War Coll. Int'l L. Studies 77 (1980).
[287]Henriksen, *supra* note 265, at 39.
[288]Miller, *supra* note 286, at 98.
[289]Henriksen, *supra* note 265, at 39-40.

In the Afghanistan intervention, the Soviets claimed that their assistance was "repeatedly requested." An examination of the events leading up to the Soviet intervention reveals that, in making this claim, the Soviets are asking the world community to believe that the recognized head of the Afghan government had requested Soviet assistance in his own downfall and execution, that a group of "exiled" Afghans, loyal to and under the protection of the Soviets, had a right to request Soviet assistance without the approval of the functioning and world-recognized government in Kabul, or that the Soviets had a unilateral right to act upon what may be termed a legal fiction of standing invitation, derived from their "self-perceived role as the guardian of the true principles of socialism and [their] acute ear for hearing the real wishes of the people, [as opposed to] the wishes of the internationally recognized government of Afghanistan."[290]

The Soviet claim of intervention by invitation should be recognized as a claim not based on fact and nothing more than a palliative for the bitter pill of the Brezhnev Doctrine.

2. The Anticipatory Self-Defense Claim

The second justification offered by the Soviets for their intervention in Afghanistan was the doctrine of anticipatory self-defense. This claim will be analyzed using the previously-discussed criteria developed by Professor McDougal and Mr. Feliciano.[291]

(a) Characteristics of the Participants

The central participants are the Soviet Union and Afghanistan, the former a world superpower and the latter a third world country with little power. If the Soviet theory of external interference is accepted, then United States and China could also be considered as participants, the former a world superpower and the latter emerging as a superpower. The claim of external participation on the level alleged by the Soviet Union has to date been unsupported by any substantial evidence. It would be naive to assume that there has been no covert aid to the Afghan rebels, but the Soviet claim that the rebels had been "receiving actually unlimited backing from the imperialist circles of the United States, the Beijing [Peking] leaders, and governments of some other countries that were lavishly supplying the counterrevolutionary gangs with weapons, equipment and money,"[292] is made without substantiation. These bold assertions

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[290] *Id.* at 48.
[291] *See supra* notes 247-57 & accompanying text.
[292] *See supra* note 282 & accompanying text.

may be unfavorably contrasted with the clear photographic evidence of Soviet missiles in Cuba during the Cuban Missile Crisis and the large stockpiles of Soviet and Cuban arms and equipment found in Grenada. Indeed, independent press reports have indicated that the rebels receive only limited outside support and are, by and large, armed and equipped by material captured from the Soviet and Afghan armies.[293]

From the Soviet ideological point of view, these evidentiary arguments are inconsequential. Just as they have presumed an invitation for fraternal assistance, they have likewise presumed the existence of imperialist aggression.[294] The presumption derives from the Marxist-Leninist theory embodied in the law of peaceful coexistence which propounds "the irresponsible struggle of the masses against the colonial and neocolonial masters, the inherent aggression of the imperialist forces, the world-wide confrontation between the reactionary forces of war and the socialist forces of peace, and the vanguard position of the [Communist Party of the Soviet Union] is leading the forces of peace and in interpreting the true principles of communism."[295]

Thus, under Soviet ideology, "lavish" support from imperialist forces may be presumed, it need not be proven. This presumption is in contradistinction to the principles of objectivity and universality required by the world decision-making process. Neither the facts nor the ideology propounded by the Soviets meet this test for the participant base they claim in the Afghanistan intervention.

(b) Objectives of the Claimants

(1) Inclusive or Exclusive

The Soviet claimed right of intervention is based on exclusive interests. The security of its southern border is exclusive to the Soviet Union. Inclusive claims made by the Soviets, such as the alleged invitation and the obligation to provide fraternal assistance, fail; the former lacks a factual basis and the latter lacks validity as international law.[296]

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[293]*See* Wash. Post., Aug. 2, 1984, at A1, col. 2.

[294]Henriksen, *supra* note 265, at 52.

[295]*Id. See generally*, Ramundo, *supra* note 265.

[296]The Soviet claim that the law of peaceful coexistence with its component principle of socialist internationalism has become customary international law has been widely rejected. *See supra* note 269 & accompanying text.

(2) Conservation or Extension

If the Brezhnev Doctrine is accepted as valid under international law, then the fraternal assistance rendered is a conservation of values. The doctrine, however, has not been accepted and the Soviet intervention and occupation of Afghanistan must be viewed as an extension of the Soviet power value at the expense of the territorial sovereignty and political independence of Afghanistan.[297] The extension of Soviet values also includes an exploitation of Afghan natural resources; copper, iron ore, and natural gas are all being shipped from Afghanistan to the Soviet Union. The power grid of northern Afghanistan has been linked to that of Soviet Central Asia and there are new road and rail links between Afghanistan and the Soviet Union. It is apparent that the Soviets have not only extended their values in Afghanistan, but have done so as a permanent measure.[298]

(3) Requisite Consequentiality of Values Conserved

The requisite consequentiality for the Soviets in order to justify an invasion on the scale that occured in Afghanistan would be the very survival of the Soviet Union. Even the precedent-setting Cuban Missile Crisis, in which there was an actual threat of emplaced missiles, did not involve such a massive or prolonged use of force. The threat perceived by the Soviets was that Afghanistan could be "turned into a bridgehead for preparation of imperialist aggression against the Soviet Union."[299] Thus, the Soviets acted to protect themselves in anticipation of Afghanistan becoming a staging area from which preparation for aggression might occur. Under this rationale, the United States would have been justified in a unilateral massive invasion of Grenada when Maurice Bishop and his New Jewel Movement ousted the popularly-elected Eric Gairy in the 1979 *coup*. In fact, under the Soviet rationale, an invasion would have been permitted even before that, when the potential for a *coup*, whose leaders might turn toward the Communist bloc, arose.

When the consequentiality of the Soviet security interests regarding Afghanistan are weighed against the fundamental values of Afghan territorial integrity and political independence, the Soviet argument falls of its own weight. International law does not permit such a paranoid view of national security interests.

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[297] *Id.*
[298] Wall Street Journal, Nov. 7, 1983, at 34, Col. 3.
[299] *See supra* note 282 & accompanying text.

(c) Quantum of Responding Coercion

The threat to Soviet security has been demonstrated to be conjectural and limited. Consequently, the requirement of exhausting peaceful procedures becomes pre-eminent. Disregarding peaceful or even limited alternatives, the Soviets, as their initial step, launched a massive invasion of 100,000 troops that would have been disproportionate even as a last resort. The Sovies have also maintained this level of coercion since the initial invasion. "A steady stream of reports from Afghan 'freedom fighters' and Western correspondents accuse the Soviets of systematically slaughtering civilians during pacification campaigns."[300] It has been estimated that over 200,000 Afghan civilians have been killed and over four million have become refugees since the Soviet invasion.[301] The joint security mission in Grenada, in both scope and duration, is thus dwarfed by the Soviet invasion and occupation of Afghanistan.

(d) Conditions and the Reasonableness of the Expectation of Necessity

As previously stated, the most important condition which must be appraised in application of community criteria is the degree of necessity which forms the basis of the claim to use coercive self-defense. The keystone is that self-defense may be employed when the envoking participant reasonably expects that military force, as an instrument of national policy, must be used to preserve the participant's physical integrity and continued existence as an effective participant in the world community process.

The "bridgehead" fears of the Soviets were little more than paranoia, based upon both conjecture and a socialist ideological assumption. In fact, at the time of the invasion, there was a socialist regime, publicly supported by the Soviets, in power in Afghanistan. The civil unrest had been contained at a relatively steady level of intensity for some time. Whatever instability plagued the Amin government had came not from exernal sources, but from internal friction between the nationalistic and doctrinaire factions of the Afghan Communist Party. There was no "dramatic shift in this state of affairs, no element of intense immediacy, and no cry of Russian Alarm, [that] precursed the Soviet decision to intervene."[302] Under these conditions, the Soviets did not have a reasonable claim of necessity. With this lack of necessity, the Soviets have failed all of

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[300]*See supra* note 281.
[301]Moore, *supra* note 217, at 64.
[302]Henriksen, *supra* note 265, at 57.

the three fundamental requirements for a valid claim to self-defense. There were no peaceful procedures employed and the coercion used was neither necssary not proportional.

F. A COMPARISON OF THE GRENADA AND AFGHANISTAN INTERVENTIONS

The international law and the factual context of the Grenada and Afghanistan interventions have been examined above. There are four major points of comparison between the two interventions: the claim of invitation, the claim of self-defense, the availability of additional claims, and the effects on the world order system of each of the interventions.

1. The Invitation Claims

A comparison of the two requests for assistance in Grenada and Afghanistan is like comparing a real diamond with a paste imitation; both are meant to look good, but under examination, one can easily be recognized as a cheap imitation of the genuine article.

The invitation for United States participation in the joint security mission came from Grenada's Governor-General, Sir Paul Scoon, after a breakdown of authority caused by internal friction in the Grenadian government. There was no functioning government at the time of the request and he was the sole remaining source of constitutional authority in Grenada.[303]

The request for assistance in the Afghanistan intervention did not come from the functioning government in Kabul, but from a group of "exhiled" Afghanis, loyal to and under the protection of the Soviets. It was based on the Soviet doctrine of fraternal assistance, a doctrine that is widely regarded as illegal under international law.[304] Thus, the Soviet claim of invitation lacks support in both law and fact.

2. Self-defense

In the previous discussion of the interventions in Grenada and Afghanistan, it was concluded in both cases that there was an insufficient basis upon which to assert a claim of self-defense under international law. The distinction lies in the assertion of the claim. The

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[303]On October 12, 1983, in addition to Prime Minister Bishop's assassination, Deputy Prime Minister Coard resigned. *See supra* note 45 & accompanying text.

[304]*See supra* note 282 & accompanying text.

primary basis of the Soviet justification for intervention in Afghanistan was self-defense. The United States, the major participant in the Grenada intervention, did not justify its actions by a claim of self-defense. Davis R. Robinson, the legal adviser to the United States Department of State, indicated the significance of this distinction in a letter to Professor Edward Gordon, the Chairman of the Committee on Grenada in the International Law and Practice section of the American Bar Association. Mr. Robinson stated:

> We [the United States] did not contend the action on Grenada was an exercise of the inherent right of self-defense recognized in Article 51 of the U.N. Charter for the same reason that the United States eschewed such arguments in support of the actions taken by the United States and other Rio Treaty members in response to the Cuban missile crisis. We did not assert that Article 2(4) had somehow fallen into disuse or been overtaken by the practice of states; we regard it as an important and enduring principle of international law.[305]

Mr. Robinson further contrasted the United States' reliance on established principles of international law with the Soviet Union's reliance on "the so-called 'Brezhnev Doctrine' - which on its face contradicts the U.N. Charter."[306] Thus, the assertion of the self-defense claim by the United States reflects the difference in respect that the two powers afforded the United Nations Charter's minimum world order system.

3. The Availability of Additional Claims

The Soviets' discredited claims of invitation and self-defense with the underlying assertion of the Brezhnev Doctrine were the only Soviet justifications for their intervention in Afghanistan. The United States and the Caribbean participants in the joint security mission have made a valid claim to intervention by invitation and have additional valid claims for intervention for regional peacekeeping. The humanitarian purposes of the Grenada mission, while not an independent legal ground for intervention, provide further mitigating support and may be contrasted with the "brutal repression of the population and widespread violation of the laws of war"[307] that have occurred in Afghanistan.

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[305]Moore, *supra* note 217, at 128.
[306]*Id.*
[307]*Id.* at 64.

4. Effects on World Order

The Soviet invasion and occupation of Afghanistan was without valid claim under international law and must therefore be characterized as aggression. The Soviet action also runs counter to self-determination for the people of Afghanistan; free elections and other forms of political freedom will not be permitted. The Secretary General of the United Nations has been informed by the Soviets that the Afghan people had already achieved self-determination in the 1978 revolution, which implemented a socialist system, and, thus, the doctrine of self-determination is no longer relevant.[308] This act of aggression, with its denial of the fundamental Charter principle of self-determination, cannot but have a negative impact on the world order system.

In contrast, the Grenada intervention was grounded in accepted principles of international law and was faithful to the principles of the United Nations Charter. Self-determination has been restored to the people of Grenada. The overwhelming majority of the Grenadian people welcomed the intervention by the joint security force which, in contrast to the Soviet continuing occupation of Afghanistan, was withdrawn shortly after it had intervened. The Grenada mission is an example of how the world order system can effectively keep peace and insure that the principle of self-determination is upheld.

VIII. CONCLUSION

The United Nations Charter was adopted at a time of optimism following the allies' victory in World War II. There was a general consensus on the preference of collective over unilateral action. The primary responsibility for the maintenance of peace in the world was given to the Security Council of the United Nations. It was hoped that the major powers on the Security Council could work together to protect the shared fundamental values of the world community. That hope has not been realized and there is no workable consensus of values within the Security Council. As a consequence, the Security Council has been unable to deal effectively with events that fall within its primary responsibility. Many members of the world community have opted to interpret the Charter in light of the experience gained in the nearly forty years of the Charter's existence. If the Security Council cannot carry out its responsibilities effectively, then the authority of regional organizations to intervene

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[308] *Id.* at 63.

as a peacekeeper must be recognized. If the Security Council cannot protect the nationals of one state located in another state, then the customary law right to limited self-help must be granted to the protecting state. A reasonable approach to interpretation of the Charter will promote the fundamental values it contains for the inclusive benefit of the world community.

Under this approach, the Grenada intervention was justified on two separate grounds. It was a lawful exercise of regional peacekeeping by the appropriate regional organization. Participation by the United States, Barbados, and Jamaica was also undertaken at the invitation of both the regional organization and the only remaining constitutional authority in Grenada. The same invitation authorized the United States to intervene to protect American nationals located in Grenada and reinforces the second legal claim for the Grenada mission under the doctrine of intervention to protect nationals.

The humanitarian motives of the participants, while not an independent legal justification, provide further support as a moral argument on the overall effect of the intervention on the world public order. Peace and self-determination replaced chaos and deprivation of human rights. The cost of the operation was proportional to the risk imposed to the peace in the Caribbean region by the events which preceded the intervention. Most importantly, the Grenadian people were grateful that the intervention occurred.

There is little difficulty in contrasting the intervention in Grenada to the Soviet intervention in Afghanistan. The Soviet intervention was manufactured by the Soviets and was without legal justification. The intervention, after nearly five years, may now be called an occupation. In contrast, the Grenada intervention accomplished its purposes, consistent with international law, and has given the Grenadian people the opportunity to determine their own future without external interference.

CHARACTER EVIDENCE

by Colonel Francis A. Gilligan*

I. INTRODUCTION

Character evidence pointedly shows the distinction between logically and legally relevant evidence. When determining the admissibility of character evidence, the military judge, pursuant to the balancing test of Military Rule of Evidence 403, must decide if the probative value of such evidence outweighs the prejudicial effect.[1] Evidence that the accused is known as a criminal or has a criminal disposition may be logically relevant as to guilt, but the prejudicial effect of such evidence may outweigh the probative value.

The rules of admissibility for character evidence differ for evidence offered before or after findings; the rules of admissibility are relaxed after findings.[2] We must also distinguish evidence between uncharged acts of misconduct and credibility of witnesses.

Uncharged misconduct evidence differs from character evidence as to the method of proof and the underlying theory of logical relevance. Evidence of uncharged acts of misconduct is admissible to show that it is likely that the accused committed the crime in question. Specific acts are not admissible to show character.[3] The logical relevance of character evidence is to show the character of the person described and, ultimately, be considered as circumstantial evidence of conduct.

After any witness, including the accused, has testified, evidence of a specific character trait for veracity is admissible to diminish credibility.[4] Evidence of the accused's good character on a trait in issue, such as honesty, whether or not the accused testifies, is admissible as circumstantial evidence of innocence.[5] Thus, character

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[1]Michelson v. United States, 335 U.S. 469 (1948); Mil. R. Evid. 403.

[2]Mil. R. Evid. 1101(c). *See also* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(c)(3) [hereinafter cited as R.C.M.].

[3]M.R.E. 608(a).

[4]M.R.E. 404(a).

[5]United States v. Baldwin, 17 C.M.A. 72, 37 C.M.R. 336 (1967); United States v. Haimson, 5 C.M.A. 208, 17 C.M.R. 208 (1954).

evidence differs from credibility evidence concerning truthfulness as to the timing of the introduction of the evidence and the character trait. Additionally, character evidence is admitted as substantive evidence; evidence as to credibility is admitted for the limited purpose of determining a witness' veracity.

A third area to be distinguished is the introduction of character evidence concerning truthfulness to rehabilitate a witness under Military Rule of Evidence 608.[6] Character evidence under Rule 608 is admissible only for impeachment or bolstering after attack, not as circumstantial evidence that the accused committed the offense charged.[7] Evidence of the good character of the accused may be admitted whether or not the accused has testified. This is distinguished from character evidence as to truthfulness. Evidence as to the character trait in issue is admissible to show that it is improbable that the accused committed the offense charged.

A fourth area to distinguish are the other methods of impeachment that, absent limiting instructions, may circumstantially show the bad character of the accused. Rule 609 permits the impeachment of the accused by prior conviction under various circumstances. While this may inferentially show that the accused is a bad person, instructions to the jury are meant to clarify the purpose of the prior conviction.[8] Before permitting such impeachment under Rule 609(a)(1), the military judge must apply Rule 403. This balancing test does not apply, though, under Rule 609(a)(2). Additionally, Rule 608 would permit the impeachment of the accused by specific instances of conduct. These instances are not admitted as substantive evidence, nor may they inferentially show the bad character of the accused. Again, Rule 403 would require a balancing test before such impeachment is permitted. Another method of impeachment of the accused would be through contradiction of the testimony of the accused brought out on direct examination, volunteered on cross-examination, or brought out on cross-examination. The rules may vary depending upon whether the contradiction has taken place on the merits or during the sentencing stage of the trial. Where the impeachment is related to misconduct by the accused, the military judge should instruct the court-members as to the purpose of the evidence. It may or may not be considered as substantive evidence.

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[6]*See* United States v. Cylkouski, 556 F.2d 799 (6th Cir. 1977).
[7]Mil. R. Evid. 608.
[8]Dep't of the Army, Pamphlet No. 27-9, Military Judges' Benchbook, para. 7-13 (1 May 1982).

Rule 404(a) attempts to substantially change the former provision of the 1969 Manual for Courts-Martial.[9] Under the latter, evidence of the accused's "general character" was admissible to demonstrate that it was less likely the accused committed the charged offense.[10] Rule 404(a)(1) allows only evidence of a "pertinent trait of the character of the accused offered by the accused, or by the prosecution to rebut the same."[11]

II. CHARACTER OF THE ACCUSED

Even though the defendant has a poor reputation in the community for a pertinent character trait, the prosecution may not introduce such evidence in the first instance;[12] nor is there a presumption of good character.[13] Until the defendant introduces character evidence, the prosecution has nothing to rebut. The introduction of character evidence as circumstantial evidence of innocence is called "placing the defendant's character in issue." Because of the possibility of derogatory information being introduced by the prosecution, a tactical decision must be made by defense counsel as to the value of such evidence. What evidence might be introduced by the prosecution? What will be the impact of impeachment? Rebuttal by the prosecution will be discussed later.

Some might denigrate character evidence. First, those who testify are usually family or friends of the accused. Those who know the accused will obviously try to help the accused. When personally asked to appear as a witness by the accused or defense counsel, such witnesses usually do not know the dangers of character evidence and indicate their willingness to help. Unless they are questioned in detail, their evidence may be negative when considered in light of the potential for rebuttal. Second, the premise of character evidence, "good individuals do not commit crimes" is tenuous. Many of the most publicized crimes in the last few years have been committed by those who have fallen from high places. Character evi-

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[9]Mil. R. Evid. 404(a) and Analysis.

[10]Manual for Courts-Martial, 1969 (Rev. ed.), para. 138 [hereinafter cited as MCM, 1969].

[11]Mil. R. Evid. 404(a)(1).

[12]Mil. R. Evid. 404(a)(1). *See also* United States v. Tomchek, 4 M.J. 66, 70 (C.M.A. 1977).

[13]Greer v. United States, 245 U.S. 599 (1918); United States v. Tomchek, 4 M.J. 66, 70-71 (C.M.A. 1977): "This [that prosecution may not introduce character evidence in the first instance] does not mean that the law clothes the accused with a presumption of good character or reputation."

dence in the military may be more important, however, because the service person is subject to more constructive supervision and control than the average citizen.[14]

The accused places his character in issue when he testifies about his character or creates the inference that he is testifying about good character. In order to prevent the possibility of an inference of good character inadvertently being raised, the defense must properly prepare the accused to testify. The tendency of the accused to try to help himself before the jury may lead an accused to go beyond direct examination and volunteer information of good character on either direct or cross examination.

When the accused accidentally states a good opinion of himself, defense counsel should seek permission from the military judge to have the testimony striken from the record. This will prevent the prosecution from introducing damaging rebuttal evidence, a procedure that will be covered in the next section.

Several cases are illustrative. In *Weiss v. United States*,[15] the accused was charged with mail fraud. On direct examination, the accused attempted to portray himself as an outstanding architect of unusual ability and repute, implying that he would not have committed the acts charged. The Fifth Circuit held that it was permissible for the prosecutor to cross-examine him about a contract to build a house which contract violated the canons of ethics of the American Institute of Architects.

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[14]J. Wigmore, Evidence § 59 (3d ed. 1940):

> The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors,—more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his "service record," which follows him throughout his army career and serves as the basis for the terms of his final discharge.

The strength of character evidence has been seen in the command influence cases. *See, e.g.*, United Sttes v. Charles, 15 M.J. 509 (A.F.C.M.R. 1982). It is highly improper for a superior to advise a subordinate to change his views or not testify as to favorable defense character evidence.

[15]122 F.2d 675, 690 (5th Cir. 1941). *See also* United States v. Adamson, 665 F.2d 649 (5th Cir. 1982); Government of the Virgin Islands v. Roldan, 612 F.2d 775 (3d Cir. 1979); United States v. McLister, 608 F.2d 785 (9th Cir. 1979) (The accused wsa charged with cocaine distribution. Opening statements and testimony on the accused's behalf implying it was unlikely that the accused would be involved in illegal conduct, did not put the accused's character in issue so as to permit rebuttal by nine year-old conviction); (The accused testiomony on direct examination that he was a "family man" and a "steady worker" was enough to open the door).

In *United States v. Kindler*,[16] the accused, age 20, was convicted of assault with the intent to commit sodomy. During direct examination, the accused testified that he was a "perfectly normal human being right now" and at the time of the alleged offense. He also testified on direct examination that, according to his religion, a homosexual act was a "sin," thus creating the implication he did not commit the act charged. Without setting forth the theory as rebuttal to character evidence or contradiction, the court held that it was proper for the prosecution to cross-examine the accused about homosexual activity that he had engaged in between the ages of twelve and fourteen. The court said that the "rational tendency" of the accused's testimony was that he did not commit the act charged.[17]

In *United States v. Donnelly*,[18] the accused, in an unsworn statement during the sentencing stage, stated that he considered himself "a fairly responsible" individual. The court held that this statement did not open the door for evidence of two uncharged drug offenses.

It would seem that ruling of the *Donnelly* court was wrong. The accused's misconduct occurred while he was on duty as a security policeman in a controlled area. An individual involved with the use of drugs under such circumstances would not be considered to be responsible. The court did not discuss this aspect but indicated that the statement of the accused was given in the context of his family and his finances and not his duty performance. It would have been better had the trial counsel clarified this ambiguity. Trial counsel could have asked: "What do you mean by 'responsible?'" "Does it mean responsible on and off-duty?" "Would it include not performing acts that would interfere with duty performance?" "Would you be responsible if you used drugs in a controlled areas?" "Didn't you use drugs in a controlled area?"

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[16]14 C.M.A. 394, 34 C.M.R. 174 (1964). *See also* United States v. Spence, 3 M.J. 831, 836 (A.F.C.M.R. 1977) (the introduction of the accused's performance records puts his general character in issue sufficiently to allow the prosecution to introduce testimony of a criminal investigator as to the accuesd's bad reputation.); United States v. Clark, 49 C.M.R. 192, 197 (A.C.M.R. 1974) (where the accused in extenuation and mitigation conveyed the impression that he was arrested for receiving five stolen checks and that this was the scope of the conspiracy, the prosecution was permitted to rebut this by testimony of a co-conspirator as to the nature and duration of the conspiracy); United States v. Hayes, 48 C.M.R. 67 (A.F.C.M.R. 1973) (the court held that a statement by the accused that he had not engged "in a fight like this before in teh service" when he was charged with assault on a superior commissioned officer in the execution of his office did not constitute even by inference a broad disclaimer of any previous confrontation with authority.).

[17]United States v. Kindler, 14 C.M.A. 394, 399, 34 C.M.R. 174, 179 (1964).

[18]United States v. Donnelly, 12 M.J. 503 (A.F.C.M.R. 1981), *aff'd, on other grounds* 13 M.J. 79 (C.M.A. 1982).

Because of the dangers of rebuttal, the defense may move for an order compelling the government to disclose the specific instances of conduct that it intends to use in cross-examining defense character witnesses. Such a motion was made in *United States v. Baskes*[19] After the court denied the motion and the accused was convicted, he appealed, contending that he had been forced to withhold significant character testimony rather than risk impeachment by undisclosed and unverified conduct. The court held that the trial court did not abuse its discretion in refusing to make such a ruling.

Prior to the Military Rules of Evidence, the accused could have placed in issue his general law-abiding character or other relevant specific character traits.[20] Colonel Boller has set forth a list of offenses generically and the traits from which one may draw the inference of commission or noncommission of the offense.[21] Military Rule of Evidence 404(a)(1) does not employ the term "specific character trait" but the term "pertinent trait."[22] Such evidence may be introduced to show circumstantially that the accused did not commit the offense. The Analysis states that Rule 404(a)(1)

> is a significant change from ¶ 138*f* of the present Manual which also allows evidence of general good character of the accused to demonstrate that the accused is less likely to have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable[23]

Rule 404(a)(1) is taken verbatim from the federal rule. The Federal Advisory Committee in its Notes did not use the term "specific" character trait but spoke in the terms of "pertinent" trait.[24] It stated:

> [A]n accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape. . . .

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[19]641 F.2d 471 (7th Cir. 1980). While a motion in limine may still be made today, it probably will not be reviewable on appeal unless the accused testifies. In Luce v. United States, 36 Crim. L. Rptr. 3001 (U.S. 10 Dec. 1984), the Court held that a judge's ruling on a motion in limine was not reviewable on the issue of impeachment by prior conviction unless the accused testified.

[20]MCM, 1969, para. 138*f*.

[21]Boller, *Proof of the Defendant's Character*, 64 Mil. L. Rev. 37, 76-78 (1974).

[22]Mil. R. Evid. 404(a)(1).

[23]*Id*. analysis.

[24]Fed. R. Evid. 404(a)(1), Advisory Committee's Note.

> The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.[25]

Following the rationale of the Advisory Committee to limit the evidence to a specific character trait, the Analysis to the Military Rule of Evidence 404(a)(1) continues:

> It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders.[26]

Military Rule 404(a)(1) uses the term "pertinent" and not "specific" evidence that the accused is or was a law-abiding citizen or is a good service member. The term "law-abiding" citizen or "good soldier" is a short-hand way of saying that, based on the witness' opinion or the accused's reputation in the community, it is unlikely that the accused committed the offense charged. From the perspective of the witness, the lawyer asking the question, or the fact-finder, this expression generally means that the accused enjoys a good reputation or the witness has a good opinion of the accused as to the specific trait in issue. Many lawyers do not see the need to focus on the specific trait. Their belief is that evidence of good character is just as weighty to a jury not skilled in the law of evidence as is evidence as to a pertinent trait to use the term of the rule. Arguably in a close case, evidence of good character, alone or with the presumption of innocence, may raise a reasonable doubt as to the guilt of the accused.[27]

At least one panel of the Fifth Circuit has held that evidence that the accused was a law-abiding citizen is admissible under Federal Rule 404(a)(1). In *United States v. Hewitt*,[28] the accused was charged with the unlawful possession or receipt of firearms. Although the accused did not testify, the defense sought to introduce character evidence as to the accused's veracity and lawfulness. The trial judge refused to permit the introduction of this evidence, apparently because the accused did not take the witness stand.

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[25]*Id.*

[26]*See, e.g.*, Mil. R. Evid. 404(a)(1) analysis.

[27]United States v. Clemons, 16 M.J. 44 (C.M.A. 1983). *Cf.* United States V. Stanley, 15 M.J. 949 (A.F.C.M.R. 1983); United States v. Belz, 14 M.J. 601 (A.F.C.M.R. 1982).

[28]634 F.2d 277 (5th Cir. 1981).

The Court of Appeals stated that the trial judge was correct as to the accused's "truth and veracity" because the accused did not testify, but that evidence that the accused was a "law-abiding" citizen was admissible. The court quoted the following language of Justice Jackson from *Michelson v. United States:*

> [T]he line of inquiry [into character] denied to the State is opened to the defendant because character is relevant to resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged.[29]

The court noted that, in *Michelson*, the defense introduced evidence that the accused was a "law-abiding citizen" even though this evidence was "broader than the crime charged."[30] The court stated that even McCormick's treatise "cites no relevant authority for the proposition that evidence of general traits of character should be excluded. . . ."[31] McCormick only applied the rule that relevant character traits are admissible.[32] The court noted that Wigmore took an opposing view to that of McCormick.[33] Nonetheless:

> Our own survey convinces us that the actual practice in the states has generally been to permit defendants to establish their character for lawfulness, and that the federal courts have unanimously assumed that to be the practice . . . we are loath to assume that its drafters [Federal Rule 404(a)(1)] meant to overturn the narrow holding of *Michelson* without specifically so noting.[34]

After testing the trial judge's ruling for specific prejudice, the court reversed and remanded the case.

Hewitt was followed by the Court of Military Appeals in *United States v. Clemons.*[35] In *Clemons*, the accused had been found guilty of larceny, wrongful appropriation, and unlawful entry. Judge Fletcher wrote the majority opinion and stated that "it is clear that the traits of good military character and character for lawfullness each evidenced 'a pertinent trait of the character of the accused' in

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[29]*Id.* at 279.
[30]*Id.*
[31]*Id.* at 280.
[32]*Id.*
[33]*Id.*
[34]*Id.*
[35]16 M.J. 44 (C.M.A. 1983).

light of the principle theory of the defense case."[36] The defense theory of the case had been that the accused, acting as charge of quarters, had been teaching his subordinates a lesson about securing their personal property in order to shock them into insuring this security in the future.

Chief Judge Everett advanced three reasons for concurring with Judge Fletcher. First, to prohibit such evidence would raise a "substantial constitutional issue."[37] Second, after examining the analysis to Military Rule of Evidence 404(a), he could

> find very little support in public policy for applying Mil. R. Evid. 404(a) in a manner that would prohibit appellant from offering the evidence of his "law-abiding" character. I perceive no risk that trial would be unduly delayed by the presentation of such evidence or that the court members would be confused. In fact, time was wasted in the present trial while counsel and the judge split hairs as to the difference between evidence of appellant's 'trustworthiness,' which was admitted, and evidence of 'his law-abiding' character, which was excluded."[38]

Chief Judge Everett did not take into consideration that it was just a few years ago that two of the armed forces could not try some cases because of the request for character witnesses halfway around the world. Nor did any of the judges in *Clemons* address alternative means of introducing character evidence. The third reason set forth by Chief Judge Everett was as follows:

> In candor, I also must confess that I see very little difference between a person's being of law-abiding character and being of "good" character; and I suspect that over the years many witnesses who have testified about a defendant's "good" character really meant to say that he was "law-abiding."[39]

Judge Cook, concurring in result, stated:

> I concur that character for lawfulness is a "pertinent trait" within the meaning of Mil. R. Evid. 404(a)(1). . . . In addition, in view of the defense theory that appellant was

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[36] *Id.* at 47.
[37] *Id.* at 49.
[38] *Id.* at 50 (footnote omitted).
[39] *Id.*

> acting legitimately in his role as a noncommissioned officer, I am persuaded that appellant's military character was "in issue" and pertinent."[40]

In *United States v. Piatt*,[41] the charges against the accused arose in the context of the performance of his military duties as a drill instructor.

> A past character for performing such duties in a proper manner would tend to undermine the implication that he willfully departed from normal standards in training . . . his character as a good drill instructor was clearly pertinent to the question of his intent to do the charged offenses.[42]

The Court of Military Appeals continued the more expansive use of Rule 404(a) in *United States v. Kahakauwila*, stating:

> Here the offense of selling marihuana was charged as a violation of Naval regulations. Evidence of the accused's performance of military duties and overall military character was admissible to show that he conformed to the demands of military law and was not the sort of person who would have committed such an act in violation of regulations. In view of the closeness of the case, the impeachment of the character of the informer, and the military judge's obvious difficulties in reaching findings of guilty, we cannot say the exclusion of such evidence reasonably could not have prejudiced the accused's case.[43]

There is no time limitation as to evidence of good character. The accused may show his good character as to that trait both before and after the alleged offense.[44] As a practical matter, the weight to be afforded character evidence after the alleged offense is questionable; but this issue does not go to admissibility, but to weight.

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[40]*Id.* at 51.

[41]17 M.J. 442 (C.M.A. 1984). *See also* United States v. McNeill, 17 M.J. 451 (C.M.A. 1984).

[42]United States v. Piatt, 17 M.J. at 446.

[43]19 M.J. 61, 62 (C.M.A. 1984). *See also* United States v. Everage, 19 M.J. 189, 192 (C.M.A. 1985) (accused charged with possession of marijuana and drug paraphenalia; evidence as to truth and veracity not a "pertinent trait" of character).

[44]*See* United States v. Monroe, 39 C.M.R. 479 (A.B.R. 1968).

III. PROSECUTION REBUTTAL

After the accused has attempted to show circumstantially by character evidence that he did not commit the alleged crime, the prosecution may attempt to rebut this evidence. The prosecution is not limited to the method used by the accused. As mentioned earlier, the defense may intentionally place the accused's character in issue, that is, show circumstantially by character evidence that he or she did not commit the crime charged. The accused may also unintentionally put his character in issue. A third possibility is that the defense may try to limit what it feels will be compelling prosecution rebuttal by carefully limiting the evidence as to either the trait or to the time period. The reasonable inference from such evidence may be that the accused also had good character extending beyond this trait or period of time. Fourth, when the accused takes the witness stand to testify on the merits, the accused places in evidence his or her character as to truth and veracity. Of course, the accused is not required to testify, and failure to do so may not be a basis for any inference.[45]

The prosecution may rebut character evidence by cross-examination or by direct evidence in the form of reputation or opinion type evidence.

The classic case concerning rebuttal by cross-examination is *Michelson v. United States*.[46] The defense called five character witnesses, two of whom had known the accused for over thirty years. They testified that he enjoyed a good reputation in the community for honesty and truthfulness. The prosecution asked these witnesses whether they had heard about a prior conviction of the accused and that he had been arrested twenty-seven years ago for receiving stolen goods. The Supreme Court held that the question about the arrest was permissible even though such impeachment had been severely criticized.

When the question about the arrest was asked, the trial judge held a session out of the presence of the jury to ensure that the prosecution had a factual basis for the question. The prosecutor indicated that he was in possession of a basis for the arrest, and this was not challenged by the defense counsel. The judge gave limiting instructions, without objection, on three occasions.[47]

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[45]U.S. Const. amend. V.
[46]335 U.S. 469 (1948).
[47]*Id.* at 472.

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat for it is not the man that he is, but the name that he has put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusions.[48]

The Court said that, if the witness knew of the arrest or conviction, it ought to show that their standard of good reputation is questionable. If the person did not know of any of the above, it may impeach the witness by establishing that the witness is not familiar with the defendant.

The Court refused to follow the state rule which limited the rebuttal to "very closely similar if not identical charges."[49] The defendant attempted to show his character traits beyond the crime charged, so the Court would not limit cross-examination as requested.

> It is not only by comparison with the crime on trial but by comparison with the reputation asserted that a court may judge whether the prior arrest should be made a subject of inquiry. By this test the inquiry was permissible. It was proper cross-examination because reports of his arrest for receiving stolen goods, if admitted, would tend to weaken the assertion that he was known as an honest and law-abiding citizen.[50]

The Court also examined the time element to determine if the trial court judge had abused his discretion. Generally, a trial court would exclude inquiry about a twenty-seven year old arrest because it would have been "lived down and dropped from the present thought."[51] However, two of the character witnesses said that they had known the accused for thirty years. Additionally, on direct examination, the accused voluntarily called attention to a twenty year

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[48] *Id.* at 479.
[49] *Id.* at 483.
[50] *Id.* at 483-84.
[51] *Id.* at 484.

old conviction.[52] Although not mentioned by the Supreme Court, the accused made it appear that he was baring his soul to the jury and that, except for this conviction, his past was spotless.

In another evidentiary area, when an expert witness testifies that the accused is suffering from the "battered woman syndrome" to show the reasonableness of her action, the government may not introduce evidence of specific instances of misconduct. In reaching this conclusion the Supreme Court of Washington stated:

> Unlike the Federal Rules of Evidence, Washington's evidentiary rules do not permit proof of character by opinion testimony. . . . Further, even assuming petitioner could have offered evidence of a pertinent trait of character by means of the expert testimony, the State's evidence of prior acts was not proper rebuttal. When an accused offers evidence of pertinent trait of character, it may be rebutted by cross-examination of character witnesses or contrary proof of reputation in the community, not by evidence of specific instances of misconduct. . . .[53]

The court did not speak in terms of questioning the bases of the expert witness. Nor did it address the contradiction of such facts judged, but commented: "This decision effectively silences prosecutor when faced with a self-defense claim based, in part, on the contention that the defendant was the victim in a battering relationship."[54]

The scope of cross-examination about misconduct is not limited to prior arrests or convictions. The *Michelson* Court indicated in dictum that the prosecution may inquire about "damaging rumors," false arrest,[55] or an acquittal that "may damage one's good name if the community receives the verdict with a wink and chooses to remember defendant as one who ought to have been convicted."[56] How the community will view the misconduct will vary and thus the

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[52]Michelson v. United States, 335 U.S. at 479. A classic example is a character witness in a trial for murder. She testified that she had grown up with defendant, knew his reputation for peace and quiet, and that it was good. On cross-examination, she was asked if she had heard that the defendant had shot anybody and, if so, how many. She answered, "three or four," and gave the names of two but could not recall the names of others. She still insisted, however, that he was of "good character." *Id.* at 479 n.16.

[53]State v. Kelly, 35 Crim. L. Rptr. (BNA) 2331 (Wash. June 28, 1984).

[54]*Id.* at 2332.

[55]355 U.S. at 482.

[56]*Id.*

accused's reputation may also vary. "A conviction . . . may be accepted as a misfortune or an injustice, and even enhance the standing of one who mends his ways and lives it down."[57]

Some federal courts have permitted prosecutors to cross-examine character witnesses about rumors of misconduct,[58] arrests,[59] or prior convictions.[60] Other courts have limited cross-examination about misconduct to that closely resembling the crime charged.[61] In any event, extrinsic evidence may not be introduced as to the specific acts surrounding this misconduct, arrest or conviction.[62] It would also seem to be impermissible to allow the cross-examiner to press the witness about the witness' opinion by showing a witness a copy of the arrest or conviction. The impact of displaying such a document would be as damaging as the introduction of the specific acts themselves. But another reason for forbidding extrinsic evidence is because of confusion and a waste of time in disputes as to the question of the specific acts having been committed. This danger would be minimized, however, where the cross-examiner is merely pressing the witness.

Prosecution rebuttal by cross-examination of defense character witnesses has been criticized. Dean Wigmore stated:

> [T]he serious objection . . . between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus, does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the

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[57]*Id.*

[58]*See, e.g.*, United States v. West, 460 F.2d 374 (5th Cir. 1972); United States v. Baldwin, 17 C.M.A. 72, 77, 37 C.M.R. 336, 341 (1967). Character witnesses may be cross-examined as to "rumors or reports of particular acts imputed to the accused. . . ." *See also* United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982) (proper to cross-examine character witness about uncharged misconduct even though the same as offense charged); United States v. Statham, 9 C.M.A. 200, 25 C.M.R. 462 (1958) (defense character witness testified that he had known the accused in the service for three years; proper for court member to ask if the accused has always been a private or has there been a reduction for misconduct).

[59]*See, e.g.*, United States v. Hkdel, 461 F.2d 721, 729 (3d Cir. 1972).

[60]*See, e.g.*, United States v. Booz, 451 F.2d 719 (3d Cir. 1971).

[61]*See* United States v. Wooden, 420 F.2d 251 (D.C. Cir. 1969).

[62]M. Graham, Federal Handbook of Evidence § 405.1, at 225 (1981).

> other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue.[63]

To insure justice, the trial judge must exercise discretion. "Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from misues."[64] As the *Michelson* Court said, "The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[65] All of these factors, except surprise, are included in Rule 403.[66]

Both sides must be controlled by the court to insure fundamental fairness and to obtain the truth. The defense, as in *Michelson*, may want to present the picture of bearing their soul to the jury and showing that their client only has a misdemeanor conviction. The inference the defense would like the jury to draw is obvious. In other cases, the defense has carefully tried to limit the time period to that in which the defendant has enjoyed a good reputation or individuals have had a good opinion of the defendant. This also may be controlled. On the other hand, the prosecution may attempt to pose questions with no basis in fact merely for the impact such questions will have on the fact finders. The value of such inquiry, even with a factual basis, is small.

The trial judge must exercise discretion by weighing prejudicial effect versus probative value. The trial judge will look at the type of misconduct and its basis in contrast with the character evidence presented. The judge may limit the inquiry to misconduct that closely resembles the subject of the charge. The time factor will also be examined. If the evidence is carefully designed to be limited in period but to have a reasonable inference that the accused has enjoyed a good reputation beyond that period, the judge may not limit prosecution rebuttal.[67] Also, if the misconduct is remote in contrast with the testimony of other witnesses, including the accused, the judge may limit cross-examination. Finally, the stage of the proceedings must be examined. Again, *Michelson* is instructive, but may be limited to its unusual facts.

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[63]J. Wigmore, Evidence § 988 (3d ed. 1940).
[64]Michelson v. United States, 335 U.S. 469, 480-81 (1948).
[65]*Id.* at 476.
[66]Mil. R. Evid. 403.
[67]*See* United States v. Kindler, 14 C.M.A. 394, 34 C.M.R. 174 (1964); United States v. Monroe, 39 C.M.R. 479 (A.B.R. 1968).

In *United States v. Parmar*,[68] the defense presented evidence during the sentencing stage as to the accused's good duty performance and his desire to remain in the Air Force. In rebuttal, the prosecution called the accused's squadron commander who testified as to the accused's having received a civilian fine for disturbing the peace and that, through the "rumor control" system in the squadron, he had learned that at least eighty members had expressed concern over theft in the barracks and several had called for disciplinary action against the accused. The court indicated that this evidence was not admissible as an exception to the hearsay rule.

Whether, in cross-examination, the prosecutor asks the witness "do you know" versus "have you heard" will depend on whether the witness has testified as to the accused's reputation, in which case the latter is the correct form, or has given an opinion as to the accused's character. Now that both reputation and opinion type evidence are admissible, the form of the question is immaterial. Additionally, many witnesses will testify as to both or intermingle the two methods of proving character.

To aid the judge and the counsel, there are various procedural safeguards that might be employed.[69] The defense counsel may ask at an Article 39(a) session for a motion *in limine* to suppress the material that the prosecution may use on cross-examination to discredit a witness' testimony. Upon an offer of proof or evidence, the judge may then make a tentative ruling on the subject matter. It would be tentative because what is presented at the Article 39(a) session may vary substantially from that ultimately presented at trial. During the trial the judge may ask for a side bar or Article 39(a) session when the prosecution seeks to make an inquiry like in *Michelson* about prior misconduct by the accused. The judge would learn of the basis for the question: arrest, conviction, or rumor, and the nature of the support for any. It would be unethical for the prosecutor to attempt to make an inquiry unless there was a reasonable basis for the question.[70] Finally, the judge may give limiting instructions to the court members.

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[68]12 M.J. 976 (A.F.C.M.R. 1982).

[69]While not a procedural device, a motion that will help judges and counsel to sort out cumulative evidence is at Appendix A.

[70]ABA Standards Relating to Prosecution Function § 5.7(d); ABA Standards Relating to Defense Function § 7.6(d) (Approved Draft 1971). *See also* United States v. Donnally, 13 M.J. 79 (82 (C.M.A. 1982); United States v. Britt, 10 C.M.A. 557, 561, 28 C.M.R. 123, 127 (1959) ("suspicion or allegation of wrong-doing as a substitute for the fact of misconduct is impermissible").

Powerful cross examination may be unrelated to convictions, arrests, or acts of misconduct. If the accused is charged with indecent acts with a child under 16 years of age, the witness may be asked if his opinion would be the same if the accused was guilty. Another technique would be to question the witnesses as to whether they had children. If they did, a further question would be whether they would trust their children with the accused. A pause in the answer or an appearance of embarrassment by their answer may carry the day to contradict the witness.

Other approaches may also be taken. How long has the witness known the accused? Was he a good worker? Was he conscientious? Would he act in haste? Would it surprise you that he planned the crime while working for you? What is the evidence that you know? If I told you some of the facts, do you think those type acts are committed by a majority of people?

Cross-examination is not the only method of rebuttal opened to the prosecution. The prosecution may also call its own character witnesses to testify concerning the reputation of the accused or their opinion of the accused.[71] Generally, this information must belimited to the same character trait concerning which the defense witnesses testified.[72] The prosecution may also seek to rebut character witnesses by bringing out inconsistent acts, inconsistent statements, and evidence otherwise excluded because of a constitutional violation.

The inadmissibility of specific acts as character evidence does not apply when the evidence is elicited on cross-examination of government rebuttal witnesses.[73] The purpose of such cross-examination is to show a lack of foundation for the witness' testimony or lack of proper standard of what is bad character. If this purpoe fails, "the failure must be deemed to have fallen fairly within the areas of trial risks assumed by the accused."[74]

IV. CHARACTER OF VICTIM

Rule 404(a)(2) is an exception to the rule that character evidence may not be introduced to show circumstantially that the person acted in a specific way. The rule provides in part "[e]vidence of a

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[71]Michelson v. United States, 335 U.S. 469, 476 (1948); Mil. R. Evid. 404(a)(1).
[72]*See* United States v. Rausch, 43 C.M.R. 912 (A.F.C.M.R. 1970).
[73]United States v. Turner, 5 C.M.A. 445, 18 C.M.R. 69 (1955).
[74]*Id.* at 448, 18 C.M.R. at 72.

pertinent trait of character of the victim of the crime offered by the accused, or by the prosecution to rebut the same" is "admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." Under the prior Manual provision, the defense could introduce evidence as to not only the character of the alleged victim of a violent crime,[75] but also the character of the alleged victim of a sex offense.[76] Presently, neither the former Manual provision nor Rule 404(a)(2) applies to victims of sex offenses. Rule 412, as amplified by the federal rules, applies to the victim of sex offenses and is covered in an article on credibility of witnesses.[77]

Military Rule 404(a)(2) is a modification of Federal Rule 404(a)(2). First, the military rule does not limit to homicide cases the ability of the prosecution to present evidence that the victim was peaceful.[78] The prosecution may introduce such evidence in "a homicide or assault case."[79] Second, the term "first aggressor" was modified in the military rule to read "an aggressor" since "military law recognizes that even an individual who is properly exercising the right to self-defense may overstep and become an aggressor."[80]

The defense may introduce evidence of the victim's pugnaciousness. Such evidence, if known by the accused, would establish the accused's apprehension and the reasonableness of his defensive measures. The defense may introduce such evidence even if the accused was unaware of the victim's reputation. This evidence "may throw much light on the probabilities of the deceased's action."[81] Dean Wigmore warned that this evidence should be received with great caution because "the deceased's bad character is likely to be put forward to serve improperly as a mere excuse for the killing, under the pretext of evidencing his aggression, and it is often feasible to obtain untrustworthy character-testimony for that purpose."[82]

The prosecution may rebut defense evidence of the pugnacious character of the victim. The prosecution is not limited to rebuttal,[83]

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[75]MCM, 1969, para. 138*f*(3).

[76]*Id.* para 153*b*(2)(b).

[77]Gilligan, *Credibility of Witnesses*, ___ Ohio St. L.J. ___ (1985).

[78]Mil. R. Evid. 404(a)(2) analysis.

[79]*Id.*

[80]*Id.*

[81]J. Wigmore, Evidence § 63 (3d ed. 1940). *See also* United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975).

[82]*Id.*

[83]Fed. R. Evid. 404(a) Advisory Committee's Notes. The only minor changes to the federal rules were set forth previously.

however, because when the defense relies on self-defense "in a homicide or assault case" the prosecution may introduce evidence of the victim's peacefulness.

V. METHODS OF PROVING CHARACTER

The methods of proving the character of a victim or accused are set forth in Rule 405. There are three possible methods: reputation evidence, opinion evidence, and evidence of specific acts. As to the latter, the accused may not introduce, before findings, evidence that he has performed specific good acts.[84] Although such evidence is logically relevant, it tends to distract the court members and result in an undue consumption of time.[85] Neither may the prosecution introduce such evidence of bad acts as circumstantial evidence of guilt, unless admitted under the theory of uncharged misconduct or to negate a sweeping statement by the accused of non-involvement in criminal conduct.[86] The prosecution may cross-examine defense character witnesses about specific acts solely for impeachment.[87]

A witness may testify as to the accused's[88] reputation as to a specific character trait if the witness resided or worked in the same military or civilian community as the accused and has been in the community long enough to be familiar with the accused's reputation. "[I]t is not enough that such testimony be based upon what some or a few other have said regarding the reputation of the accused; the witness must be able to state what the community generally believes."[89] It is not necessary that the witness personally knew the accused since the witness will be testifying about what he has heard about the accused. Nor may the witness testify about personal acquaintance or knowledge of the accused which leads the witness to draw a certain conclusion.

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[84]*See* Michelson v. United States, 335 U.S. 469, 475-76 (1948); United States v. Tomchek, 4 M.J. 66, 73 (C.M.A. 1977); MCM, 1969 para. 75c(4). *But cf.* Mil. R. Evid. 405(b) ("In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct").

[85]Michelson v. United States, 335 U.S. 469, 476 (1948); Mil. R. Evid. 403. *See also* United States v. Porter, 34 C.M.R. 601 (A.B.R. 1964).

[86]*See* United States v. Whitmore, 50 C.M.R. 537 (C.G.C.M.R. 1975). Another possibility is admissibility under the "curative admissibility" doctrine. United States v. Haimson, 5 C.M.A. 208, 224 n.2, 17 C.M.R. 208, 224 n.2 (1954).

[87]*See supra* text accompanying notes 76-83.

[88]The rules discussed in reference to opinion and reputation evidence apply to the character of the victim. Mil. R. Evid. 405(a).

[89]United States v. Tomchek, 4 M.J. 66, 72 (C.M.A. 1977). Mil. R. Evid. 405(d) provides: "'Community' in the armed forces includes a post, camp, ship, station, or other military organization regardless of size."

> The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. The evidence which the law permits is not as to the personality of the defendant but only as to the shadow his daily life has cast in his neighborhood.[90]

This testimony is not time-consuming since it is a compact phrase for the fact-finder to consider; it is the picture of the person over days, months, and years: "The resultant picture of forgotten incidents, passing events, habitual and daily conduct. . . ."[91]

The community in which a person lives or works is not marked by political boundaries. At common law, a community had more meaning. Now, with great cities and large metropolitan areas the meaning is different.

> The rule is broadly stated that evidence of the good or bad character of a party must relate and be confined to his general reputation in the community or neighborhood in which he resides or has resided. However, the term "community" or "neighborhood" is not suspectible of exact geographical definition, but means, in a general way, where the person is well known and has established a reputation, so that the inquiry is not necessarily confined to the domicile or residence of the party whose reputation is in question, but may extend to any community or society in which he has a well-known or established reputation.[92]

The reputation may be in either the military or civilian community[93] or where the person works or resides. Usually, the person is assigned to a unit made up of several individuals with a commander. Generally, there is a close relationship between the commander and the service member. However, the service member may be assigned to a headquarters unit for "bookkeeping purposes." Usually the commander of a headquarters unit does not know all the members of the unit even if the commander has been in the unit for some time. Absent the exception, the "opinion of a serviceman's commanding officer occupies a unique and favored position in military judicial pro-

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[90]Michelson v. United States, 335 U.S. 469, 477 (1948).

[91]*Id.*

[92]29 Am. Jur. 2d *Evidence*, § 347 (1967), *cited in* United States v. Tomchek, 4 M.J. 66, 77 (C.M.A. 1977) (Cook, J., dissenting).

[93]*See* United States v. Johnson, 3 C.M.A. 709, 14 C.M.R. 127 (1954); Mil. R. Evid. 405(d) and Analysis.

ceedings.''[94] The commander will normally see the service member frequently and receive reports from the chain of command.

The character witness must have been in the community long enough to have become familiar with the accused's reputation in the community. In *United States v. Crowell*,[95] such knowledge was established when the witness had been the commander for over seven months, saw the accused weekly, and said he knew the accused's general reputation for veracity.

Opinion evidence may also be introduced.[96] To lay a proper foundation for opinion evidence, the proponent must show that the character witness knows the accused personally and is acquainted with the accused well enough to have had an opportunity to form an opinion as to the trait in issue.

VI. CHARACTER EVIDENCE AFTER FINDINGS—GENERALLY

The prior sections were concerned with character evidence presented during the case-in-chief. However, the case is not over for either counsel just because findings have been announced. Just as important is character evidence after findings. Military Rule of Evidence 1101(c) provides: ''The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.'' For ease of discussion, the remaining sections are divided into the evidence initially introduced by the prosecution, defense evidence, and prosecution rebuttal. The last category demonstrates how the defense may control what is presented to the sentencing authority.

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[94]United States v. Carpenter, 1 M.J. 384, 386 (C.M.A. 1976).

[95]6 M.J. 944, 946 (A.C.M.R. 1979). *See also* United States v. Wyrozynski, 7 M.J. 900 (A.F.C.M.R. 1979); United States v. Spence, 3 M.J. 831 (A.F.C.M.R. 1977) (investigator who had lived in the same community as the accused for nine months could testify as to the accused's reputation in the community). *But see* United States v. McClure, 11 C.M.A. 552, 29 C.M.R. 368 (1960) (Article 32 investigating officer with no previous contact with the accused was not sufficiently acquainted with the accused to express an opinion as to soldierly qualities—additionally, officer abused his judicial assignment testifying for the prosecution).

[96]Mil. R. Evid. 405(a). *See also* United States v. Evans, 36 C.M.R. 735 (A.B.R. 1966) (witness was qualified to express opinion when he had known the accused for five months on both a formal and informal basis during which time they had many discussions). United States v. Vandelinder, 20 M.J. 41, 46 (C.M.A. 1985). The court held that ''opinions about a service-member's military character contained in Enlisted Performance Records are admissible as 'other written statements' within the meaning of Mil. R. Evid. 405(c).'' The court did not state whether these may be admitted in lieu of a witness' testimony. The court held that the failure to admit Enlisted Performance Reports was harmless error.

The objectives of the military criminal justice system will not be met unless appropriate sentences are adjudged for offenders. In the military, the accused has the choice of sentencing authority, military judge or court members. This causes disparate sentencing and limits the information that is given to the sentencing authority. Before the judge in the federal system announces a sentence, the judge is presented with a presentence report.[97] Such a report would be helpful in the military. To achieve the objectives of sentencing and, hence, the military criminal justice system, it would be preferable if the judge was the sole sentencing authority,[98] unless there is a special court-martial without a military judge: "The premise has been that the sentencing authority should receive full information concerning the accused's life and characteristics in order to arrive at a sentence which will be appropriate in light of the purpose for which a sentence is imposed."[99] It has also been said: "[A] review of the total criminal background of a defendant has always been approved."[100]

The information furnished the sentencing authority should include at least the following: (1) complete description of the situation surrounding the criminal activity; (2) offender's educational background; (3) offender's employment background; (4) offender's social history; (5) residence history of the offender; (6) offender's medical history; (7) information about environment to which the offender will return; (8) information about any resources available to assist the offender; and, (9) full description of the offender's criminal record.[101] As will be developed, all of this is not present under the military sentencing procedure.

To ensure that sentences are not disparate, the defense may attempt to introduce evidence as to other sentences in similar cases or cases of co-accused who were tried separately. The prosecution may want to introduce such evidence when the sentence in the first case was what the prosecution considered appropriate. On appeal, the courts of military review have the authority to correlate sentences in similar cases.[102] But, should this be permitted at the trial level? The

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[97]Fed. R. Crim. P. 32.

[98]The Military Justice Act of 1983 Advisory Commission, Vol. I, Pt. 2 (Dec. 1984).

[99]United States v. Mack, 9 M.J. 300, 316 (C.M.A. 1980) (Everett, C.J., in majority opinion).

[100]National Advisory Commission, Task Force on Corrections 184-85 (1973).

[101]*See, e.g.*, United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982). The key is that sentencing must be individualized. "[H]ighly disparate sentences in closely related cases" is only one aspect of sentence appropriateness. Affirmed sentence of the accused who received BCD, confinement or hard labor for one year and a day, total forfeiture and reduction to E-1, while another co-accused received a field grade (Article 15). United States v. Coldiron, 9 M.J. 900 (A.F.C.M.R. 1980).

Court of Military Appeals has not directly decided the issue. I *United States v. Mamaluy*,[103] the court held that an instruction that the court members could consider sentences in other cases for similar offenses was found to have been error. First, the appellate courts would not know what other cases upon which the court members relied. Second, the sentences should be based on the seriousness of the offense, the character of the accused, and the objectives of sentencing. Finally, such an instruction would require the court to become involved in collateral issues. Rule 403 would prevent the introduction of evidence from other trials whether introduced by the prosecution or defense to avoid confusion of issues, undue delay, and waste of time regardless of the sentencing authority.[104] This may seem unfair, yet the military has the luxury that the sentences are reviewed on appeal.

VII. PROSECUTION EVIDENCE AFTER FINDINGS

What can the prosecution introduce to meet the objectives of sentencing? After findings, the prosecution may introduce prior convictions, personnel records, or matters in aggravation. These areas will be divided into the practice under the 1969 and 1984 Manuals. The 1984 Manual is not a complete break with the past, and it can be better understood in light of past practices.

A. 1969 MANUAL

Prior convictions

The prosecution may introduce evidence of a valid, final prior court-martial conviction by the accused "for offenses committed six years next preceding the commission of any offense which the accused has been found guilty."[105] The six-year period is tolled during

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[103]10 C.M.A. 102, 104-07, 27 C.M.R. 176, 178-81 (1959). The judge also instructed the members they could consider local conditions and the impact of inadequate sentences on the civilian community. Even though the Court of Military Appeals found that the instruction on these factors to be error, it was held to be harmless.

[104]Mil. R. Evid. 403.

[105]MCM, 1969, para. 75*b*(3). *See also* United States v. Castillo, 11 M.J. 163 (C.M.A. 1981).

periods of unauthorized absences.[106] A certificate of rehabilitation does not affect admissibility of prior convictions during sentencing.[107]

The prior conviction may be introduced as simply a matter in aggravation or to trigger the escalator clause.[108]

Valid. The conviction must be valid. A summary court-martial conviction can not trigger the escalator clause unless the prosecution establishes that the accused was represented by counsel or waived the right to counsel[109] When the escalator clause is not in issue, the position of the courts is unclear. In *United States v. Cofield,*[110] the Court of Military Appeals held that a prior summary court-martial conviction for larceny could not be used for impeachment because of the "accuracy of the fact-finding process." In *United States v. Taylor,*[111] the Army Court of Military Review indicated that it was not sure of the position that the Court of Military Appeals will take as to the admission of summary court-martial convictions in sentencing procedures. Thus, the court held that it was error to receive records of prior summary court-martial convictions without estab-

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[106]*Id.* The 1951 Manual had a three year period and a requirement that the conviction had to be within the present enlistment. Dep't of Army, Pamphlet No. 27-22, Analysis of Contents, Manual for Courts-Martial, 1969, Revised Edition, 13-5 (July 1970) [hereinafter cited as MCM Analysis].

[107]United States v. Stevens, 13 M.J. 832 (A.C.M.R. 1982). The court held that Rule 609(c) was intended only to apply to the admissibility of prior convictions for impeachment purposes and not to sentencing. Thus, a certificate of rehabilitation would not preclude the admissibility of the prior conviction.

[108]MCM, 1969, para. 127*c*.

[109]United States v. Booker, 5 M.J. 238 (C.M.A. 1977), *vacated in part*, 6 M.J. 357 (C.M.A. 1978). *Cf.* United States v. Cofield, 11 M.J. 422 (C.M.A. 1981); United States v. Kuehl, 11 M.J. 126 (C.M.A. 1981). The *Booker* court held that a summary court-martial conviction was properly admitted over defense objection when the accused signed the document realizing that he had the right to consult with independent legal counsel and that the government would provide a lawyer for such consultation at no expense. United States v. Mack, 9 M.J. 300 (C.M.A. 1980). Judge Cook stated:

> The principal opinion [by Chief Judge Everett] in the present case would not permit the use of a previous summary court-martial conviction for enhancement of the sentence, even if the accused had waived the right to counsel or had actually been represented by counsel. This holding is inconsistent with *Baldasar* [v. Illinois, 100 S. Ct. 1585 (1980)] because the principal opinion observed that there had been no waiver of counsel during the previous criminal proceeding.

Id. at 327.

Judge Fletcher stated: "The only majority opinions as to the law, for the admissibility of summary courts-martial records . . . is *Booker*. . . ." *Id.* at 328.

[110]11 M.J. 422 (C.M.A. 1981). *See also* United States v. Bartlett, 12 M.J. 881 (A.F.C.M.R. 1981) (per curiam); United States v. Wilson, 12 M.J. 652 (A.C.M.R. 1981).

[111]12 M.J. 561 (A.C.M.R. 1981).

lishing that the accused was aware of the right to counsel and afforded the opportunity to consult with counsel.[112] Because defense counsel did not object, the error was waived. Waiver because of the failure to object has been found in other cases.[113]

Normally, the prior conviction is not subject to collateral attack. Where, however, the evidence of the prior conviction, *e.g.*, promulgating order, sets forth a verbatim specification that did not state an offense, that portion of the prior conviction may not be considered.[114]

Final. The conviction must be final. The Manual did not expressly provide for finality, but rather the accused had been tried for an offense within the meaning of Article 44(b).[115] Article 44(b) provides: "No proceeding . . . is a trial in the sense of this article until the finding of guilty has become final after review. . . ."[116] The rule as to finality might be contrasted with the rule as to impeachment by a prior conviction,[117] for which an appeal under Article 69 does not affect the finality of the conviction.[118] Even though the conviction is not noted as final, an inference of finality may be drawn after a suf-

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[112]*Id.* The court also relied on the fact that the defense counsel waived the error by not objecting. *See also* United States v. McCormick, 13 M.J. 900 (N.M.C.M.R. 1982) (error preserved for appeal when defense counsel objected); *see also* United States v. Hancock, 12 M.J. 685 (A.C.M.R. 1981) (the failure to object to the admission of a special court-martial conviction during sentencing waived the lack of finality). *Cf.* United States v. Jaramillio, 13 M.J. 782 (A.C.M.R. 1982) (trial counsel can still introduce the DA Form 2-1 showing reduction or time lost through unauthorized absence without complying with *Booker* because these entries do not necessarily result from a court-martial conviction).

[113]United States v. Hancock, 12 M.J. 685 (A.C.M.R. 1981).

[114]United States v. Russell, 37 C.M.R. 514 (A.B.R. 1966); United States v. Olson, 28 C.M.R. 766 (A.F.B.R. 1959).

[115]MCM, 1969, para. 75*b*(3) (C5, 1 April 1982). The same provision was in the 1951 Manual. MCM Analysis, 13-5 to 13-6. But this requirement was further clarified. *Id.*

[116]Article 44(b), 10 U.S.C. § 844(b)(1982).

[117]Mil. R. Evid. 609.

[118]MCM, 1969, para. 75*b*(2). This provision clarified the 1951 Manual. MCM Analysis, 13-6.

[119]*See* United States v. Heflin, 1 M.J. 131, 132 n.4 (C.M.A. 1975). *See also* United States v. Lachapelle, 10 M.J. 511 (A.F.C.M.R. 1980) (six months sufficient plus inference that promulgating order establishes finality citing United States v. Graham, 1 M.J. 308 (C.M.A. 1976); United States v. Tennent, 7 M.J. 593 (N.C.M.R. 1979) (95 days sufficient for inference; United States v. Hines, 1 M.J. 623, 626 (A.C.M.R. 1975) (only DA Form 20B and not promulgating orders are required to have notation of finality—eight months sufficient for inference—but inference rebutted by introduction of DA Form 20B which did not notation).

ficient lapse of time since the date of the trial.[119] The passage of time inference does not apply when finality is required by regulation to be noted on the official record, *e.g.*, DA Form 2-2.[120] In such cases, if finality is not noted, the evidence will be inadmissible.

In *United States v. Heflin*,[121] the Court of Military Appeals held the failure to object to a notation of finality required by regulation did not constitute a waiver absent an inference that defense attempted to obtain a tactical advantage at trial. The court said that the trial judge has the primary responsibility for the admission of such evidence.[122]

Prior. A prior conviction relating to offenses committed during the period of time preceding any offense of which the accused stands convicted is admissible. In *United States v. Boice*,[123] a prior conviction was introduced at a trial in which the accused was convicted of two specifications of wrongful appropriation between 1 January 1963 and 15 April 1963. The evidence of the prior conviction reflected that the accused was convicted in February 1963 for an offense committed on or about 29 January 1963. The court held that the prior conviction was not admissible and reassessed the sentence.

The prior conviction must be prior to one of the offenses of which the accused was convicted at the trial in which the conviction is introduced. In *United States v. Burke*,[124] the accused was convicted of two bad check offenses occurring on 3 and 4 January 1968 and an unauthorized absence commencing on 27 January 1968. The previous conviction occurred on 25 January 1968 for offenses committed on 2 and 12 January 1968. The court held that the trial judge erred in not admitting the prior conviction since the 2 and 12 January offenses occurred prior to the unauthorized absence.

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[120]United States v. Heflin, 1 M.J. 131, 132 n.4 (C.M.A. 1975) (dictum); *see also* United States v. Lemieux, 13 M.J. 969 (A.C.M.R. 1982). Regulations requiring finality are: Dep't of Air Force, Manual 111-1, Military Justice Guide para. 7-1c (C3, 15 Nov. 1978); Dep't of Army, Reg. No. 27-10, Military Justice, para. 2-25 (1 July 1984) [hereinafter cited as AR 27-10]. Even this deficiency can be waived. United States v. Hancock, 12 M.J. 685 (A.C.M.R. 1981).

[121]1 M.J. 131 (C.M.A. 1975).

[122]*Id.* at 133. *But cf.* United States v. McLemore, 10 M.J. 238 (C.M.A. 1981).

[123]33 C.M.R. 954 (A.F.B.R. 1963). *See also* MCM, 1969, para. 75*b*(3) (rev. 1981). The same provision was contained in 1951 Manual. MCM Analysis, 13-5. United States v. Geib, 9 C.M.A. 392, 26 C.M.R. 172 (1958); United States v. Austin, 3 M.J. 1060 (A.F.C.M.R. 1977).

[124]39 C.M.R. 718 (A.B.R. 1968).

Court-Martial Conviction—Vacations of Suspended Sentences. Paragraph 75b(3) of the 1969 Manual provides: "A vacation of a suspended sentence is not itself a previous conviction and is not admissible as such but may be admissible under paragraph 75(b)(2). . . ."[125]

B. 1984 MANUAL

The 1984 Manual provides: "The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule, there is a 'conviction' in a court-martial case when a sentence has been adjudged."[126] This rule has simplified the requirements that existed under the prior Manual provisions. There is no requirement for the conviction to the final,[127] other than for summary courts-martial and special courts-martial without a military judge. The lack of finality goes only to weight. Additionally, a prior conviction by summary court-martial is admissible, provided that the review of the court-martial has been completed.[128] This provision does not eliminate the constitutional requirement that the conviction be valid but merely eliminates the requirement for the showing of counsel. If there is an appeal, such evidence is admissible.[129] There is no longer a question as to the dates of the offenses to which the accused stands convicted. Finally, "[a] vacation of a suspended sentence (*see* R.C.M. 1109) is not a conviction and is not admissible as such, but may be admissible under subsection (b)(2) of this rule as reflective of the character of the prior service of the accused."[130]

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[125]MCM, 1969, para. 75*b*(3)(a) (C5, 1 April 1982). This provision was placed in the 1969 Manual as the result of United States v. Kiger, 13 C.M.A. 522, 33 C.M.R. 54 (1963). MCM Analysis, 13-6. This might be compared with the vacation of Article 15s. United States v. McLemore, 10 M.J. 23 C.M.A. 1981). Applying the presumptions in *McLemore*, this Manual provision could be modified without violating due process.

[126]R.C.M. 1001(b)(3)(A).

[127]R.C.M. 1001(b)(3)(B) provides:

> (B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of this rule until review has been completed pursuant to Article 65(c) or Article 66, if applicable. Evidence of the pendency of an appeal is admissible.

Since Article 65(c) was deleted the drafters probably mean R.C.M. 1112. *Cf.* Dep't of Air Force, Reg. No. 111-1, para. 5-3, 3 (1 Aug 1984). "A civilian criminal conviction must be final under the law the jurisdiction in which the conviction occurred before it is admissible. *See* MCM, 1984, R.C.M. 1001(b)(3)" [hereinafter cited as AFR 111-1].

[128]R.C.M. 1001(b)(3)(B). *But see* AFR 111-1, para. 5-3c. "Previous convictions by summary courts-martial in which the accused was not represented by counsel should not be offered absent of showing a waiver."

[129]*Id.*

[130]R.C.M. 1001(b)(3)(A) discussion.

Personnel Records.

It is not enough to show the existence or nonexistence of prior court-martial convictions. To correct the scarcity of material before the military sentencing authority, the revision to the 1969 Manual added paragraph 75*d*.[131]

> *Optional matter presented when court-martial constituted with military judge.* Under regulations of the Secretary concerned the trial counsel may, prior to sentencing, obtain and present to the military judge any personnel records of the accused or copies or summaries thereof. Summaries of such records will be prepared and authenticated by the custodian thereof as provided in appendix 8*g*. Personnel records of the accused include all those records made or maintained in accordance with departmental regulations which reflect the past conduct and performance of the accused. If the accused objects to the data as being inaccurate or incomplete in a specified material particular, or as containing certain specified objectionable matter, the military judge shall determine the matter. Objections not asserted will be regarded as waived. The accused may submit in rebuttal any matter which reflects on his past conduct and performance. In cases where members determine sentence, the military judge may admit for their consideration any information from these records which reflects the past conduct and performance of the accused.[132]

The Court of Military Appeals, in *United States v. Morgan*,[133] relied on this provision and paragraph 2-20b of Army Regulation 27-10, in applying the rule of completeness to the 201 file of Army soldiers upon objection by counsel.

> [W]e believe that a servicemember generally thinks of his 201 file as a single entity, which reflects his military record during his current enlistment. This being so, when personnel records are offered in evidence by the trial counsel pursuant to paragraph 75*d*, the rule of completeness should apply to all the documents contained in an accused's Military Personnel Records Jacket.

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[131]MCM 75*d* (rev. ed. 1969) (substantially unchanged in MCM, 1969, 75*b*(2) (C5, 1 Apr. 1982). *See also* White, *Mining the Gold in Personnel and Finance Records*, Trial Counsel Forum, Oct. 1982, at 2.

[132]MCM, 1969, para. 75*d*.

[133]15 M.J. 128 (C.M.A. 1983).

> Of course, if the shoe is on the other foot and defense counsel offers in evidence documents from an accused's Military Personnel Records Jacket for purposes of extenuation and mitigation, then the trial counsel may object if the defense has omitted portions thereof without which only an incomplete picture of the accused's conduct and behavior is provided.[134]

Judge Cook, concurring in the result in *Morgan*, indicated that the "production of the MPRJ *in toto*, if at all, is absurd."[135] He indicated that the contents of the 201 File may very well be irrelevant and immaterial to the case being tried and, possibly, prejudicial to the accused.[136]

In analyzing *Morgan* one must begin with the specific document. The 201 file of a private is entirely different from the 201 file of an individual who has been in the service more than 10 years. The documents of those who have been in the service a long period of time are substantial. Contrary to the majority of the court, service members do not think of the 201 file as a "single entity." Soldiers view fitness reports as separate documents. From a practical point of view, to require counsel for either side to introduce the entire document poses an economic burden on the government and results in an undue consumption of time both at trial and especially in preparing five or six copies of those documents. Rule 106 does not have to be read as broadly as the Court of Military Appeals did in *Morgan*. The Rule provides; "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party . . . to introduce any other part or any other writing or recorded statement which ought infairness to be considered contemporaneously with it." The emphasis here has to be on fairness. Is one side trying to subvert the truth by introducing only part of a document, *e.g.*, a fitness report? It is true that, by introducing a fitness report,[137] it is not fair to the accused unless his security clearance forms are also introduced? One also has to ask himself whether there is a way to prevent unfairness. The answer is clearly yes. Both sides are allowed to introduce the part of the 201 file that they think is appropriate. Neither side would want to introduce the entire 201 file. Each side will look as an advocate at the documents. The fact that an

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[134]*Id.* at 133-34.

[135]*Id.* at 137. *Cf.* United States v. Abner, 17 M.J. 747 (A.C.M.R. 1984) (*Morgan* does not apply to cases tried after 29 July 1981).

[136]United States v. Morgan, 15 M.J. at 137.

[137]Fitness reports not admissible under 1969 Manual via AR 27-10.

Article 15 or prior conviction is sought to be admitted by the prosecution should not require the admissibility of all fitness reports under Rule 106. In a great many cases, the defense would not want to submit all fitness reports. Many of the fitness reports will not tell the court members anything.

Regardless of the status of *Morgan*, the following attack may be made on personnel records: first, that the record sought to be introduced was not properly filed; second, that the record does not fall within the regulation; third, that the record violates the accused's constitutional rights, *e.g*, due process, right of counsel, right of confrontation; or fourth, that the regulation is impermissibly broad or vague.

In 1981, paragraph 75*b* was changed as follows:

> (2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, the trial counsel may obtain and introduce from the personnel records of the accused evidence of the marital status of the accused and the number of dependents, if any, of the accused, and evidence of the character of prior service of the accused. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions to include punishments under Article 15. See paragraph 75*b*(3) for evidence of prior convictions of the accused. Personnel records of the accused include all those records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to the information as being inaccurate or incomplete in a specific respect, or as containing matter that is not admissible under the Military Rules of Evidence as applied to the issue of sentencing, the matter shall be determined by the military judge or president of a special court-martial without a military judge. Objections not asserted are waived.[138]

In *Morgan*, the court noted this as a "substantial revision."[139] The court stated that the President could change the Manual provision upon which *Morgan* was based.[140] This 1981 change to the Manual

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[138]MCM, 1969, para. 75*b*(2) (C5, 1 Apr. 1982).
[139]United States v. Morgan, 15 M.J. at 131 n.4.
[140]*Id.* at 134-35.

was alto noted in *United States v. Abner*.[141] Abner made an unsworn statement in which he made no comments concerning his duty performance. He did introduce several documents from the 201 file, including a certificate of achievement and letters of commendation. Additionally, he introduced certificates for completing various training courses. In rebuttal, the prosecution called two witnesses to testify as to his poor duty performance.

On appeal, the accused argued that this testimony exceeded the scope of the appellant's unsworn statement. The government conceded error on the basis of *Morgan*. The Army Court of Military Review disagreed, based on the 1981 change to the Manual. Judge Coker stated: "Paragraph 75*b*(2), Manual, now establishes that the MPRJ is not a unitary record as determined by the court in *Morgan* under the prior provisions of the Manual."[142]

Contrary to Judge Coker is the opinion of Senior Judge Kastl of the Air Force Court of Military Review, who indicated that "it would appear that the most recent amendments to the Manual change neither the basic pattern established by the 1969 version nor the underpinnings of *United States v. Morgan*."[143]

The *Morgan* rule causes a stalemate. As a result, records which should be given to the sentencing authority are not. As noted in *United States v. Smith*: "We are seeing frequent instances where it is reasonable to infer that an accused did not submit efficiency or performance reports to the trial court for fear of 'opening the door' to damaging rebuttal, much of it being other acts of misconduct. Our concern goes to the trial court passing sentence without the benefit of important information. Therefore, we implore military judges to apply the discretion vested in their position during sentencing proceedings."[144]

The 1984 Manual sought to moot this issue. It provides:

> *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports

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[141]17 M.J. 747 (A.C.M.R. 1984).
[142]*Id.* at 748.
[143]United States v. Robbins, 16 M.J. 736, 739 (A.F.C.M.R. 1983).
[144]16 M.J. 694, 706 (A.F.C.M.R. 1983).

> reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel records of the accused" includes all those records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.[145]

The first three sentences are unchanged from the 1981 Manual revision.

> The fourth sentence of subsection (2) is modified by substituting 'a particular document' for 'the information.' This is intended to avoid the result reached in *United States v. Morgan*. . . . For reasons discussed above, sentencing proceedings in courts-martial are adversarial. Within the limits prescribed in the Manual, each side should have the opportunity to present, or not present, evidence. *Morgan* encourages gamesmanship, and may result in less information being presented in some cases because of the lack of opportunity to rebut.[146]

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[145]R.C.M. 1001(b)(2).
[146]MCM, 1984, at A21-61 to 62.

All three manuals mention service "regulations." The Army,[147]

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[147]AR 27-10, para. 5-25 (15 March 1985), provides:

5-25. Personal data and character of prior service of the accused

a. For purposes of R.C.M. 1001(b)(2) and (d), trial counsel may, in his or her discretion, present to the military judge (for use by the court-martial members or military judge sitting alone) copies of any personnel records that reflect the past conduct and performance of the accused, made or maintained according to departmental regulations. Examples of personnel records that may be presented include—

(1) DA Form 2 (Personnel Qualification Record-Part I) and DA Form 2-1 (Personnel Qualification Record-Part 2).

(2) Promotion, assignment, and qualification orders, if material.

(3) AWard orders and other citations and commendations.

(4) Except for summarized records of proceedings under Article 15 (DA Form 2627-1), records of punishment under Article 15, from any file in which the record is properly maintained by regulation.

(5) Written reprimands or admonitions required by regulation to be maintained in the MPRJ or OMPF of the accused.

(6) Reductions for inefficiency or misconduct.

(7) Bars to reenlistment.

(8) Evidence of civilian convictions entered in official military files.

(9) Officer and enlisted evaluation reports.

(10) DA Form 3180 (Personnel Screening and Evaluation Record).

b. These records may include personnel records contained in the OMPF or located elsewhere, unless prohibited by law or other regulation. Such records may not, however, include DA Form 2627-1 (Summarized Record of Proceedings under Article 15, UCMJ).

c. Original records may be presented in lieu of copies with permission to substitute copies in the record. (*See* MRE 901, for authentication of original copies.)

Navy,[148] and Air Force[149] have implementing regulations. These regulations, subject to the attacks mentioned, will determine what constitutes "personnel records."

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[148]Dep't of Navy, JAGNOTE 5800, JAG:204, para. 0133 (17 July 1984). JAGMAN now provides:

> 0133 PERSONAL DATA AND CHARACTER OF PRIOR SERVICE OF THE ACCUSED
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> Trial counsel are authorized to present matters set out in R.C.M. 1001(b)(2), MCM, 1984. Records of nonjudicial punishment must relate to offenses committed prior to trial and during the current enlistment or period of service of the accused, provided such records shall not extend to offenses committed more than two years prior to the commission of any offense of which the accused stands convicted. In computing the two-year period, periods of unauthorized absence as shown by the personnel records of the accused should be excluded.

The prior provision was as follows:

> 0117 PERSONAL DATA AND CHARACTER OF PRIOR SERVICE OF THE ACCUSED.
>
> In accordance with the authority contained in paragraphs 75b(2) and 79, MCM, the trial counsel or summary court-martial officer may, prior to sentencing, obtain and introduce from the personnel records of the accused evidence of the marital status, of the number of dependents, if any, and of the character of prior service of the accused. Such evidence includes copies; of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions to include punishments under Article 15. Personnel records of the accused include all those records made or maintained in accordance with Departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. Records of nonjudicial punishment must relate to offenses committed prior to trial and during teh current enlistment or period of service of the accused, provided such records of nonjudicial punishment shall not extend to offenses committed more than two years prior to the commission of any offense of which the accused stands convicted. In computing the two year period, periods of unauthorized absence as shown by the personnel records of the accused should be excluded. *See* paragraph 75b(2), MCM, for applicable procedural regulations.

Manual of the U.S. Navy Judge Advocate General, para. 0117 (C2, 11 June 1982).

[149]AFR 111-1, para. 5-4 (1 August 1984).

> Personnel Records. During the presentencing proceedings, personnel records, or copies or summaries thereof, reflecting an accused's past conduct and performance and maintained according to DAF directives may be admitted in evidence. Such records are limited to those maintained by the Consolidated Base Personnel Office (CBPO) and to those records of punishment under Article 15, UCMJ, imposed before sentence and not more than 2 years before the commission of any offense of which the accused stands convicted. Periods of unauthorized absence are excluded in computing this 2-year limitation. The 2-year limitation does not apply to Articles 15 kept by the CMPO in an unfavorable information file maintained under AFR 35-32, Unfavorable Information Files, Control Rosters, Administrative Reprimands, and Admonitions.

Enlistment records. When an individual enlists in the service, a number of documents are completed and filed in the accused's "personnel records." The 1984 Manual provision provides for the introduction of "personnel records of the accused. . . . Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused. . . ."[150] The first question is whether, when an individual enlists in the service, these enlistment papers are "personnel records." The second question is whether these are admissible under the service regulations. The Army regulation sets forth "examples of personnel records."[151] None of these examples include enlistment records.[152] The new Navy JAGMAN provision authorizes matters set forth in Rule 1001(b)(2).[153] Arguably this could be interpreted as not permitting enlistment records, especially when read with the prior provision.

The importance of achieving a proper sentence for the accused and society would seem to indicate that properly authenticated enlistment records should be admissible unless not properly filed. Those records would include much of the information that should be furnished the sentencing authority. Even so, the courts are split on the admissibility of some portions of these records.[154]

Civilian convictions. Properly filed, valid civilian convictions are admissible.[155] The correctness of the filing depends on service regulations. It makes no difference if the offense resulting in the civilian conviction occurred prior or subsequent to any offense charged.[156] As to the right to counsel, there is a presumption that the accused waived counsel or was represented by counsel if the right was applicable.[157] Whether the action is a conviction is determined under the law of the forum.[158]

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[150]R.C.M. 1001(b)(2).
[151]AR 27-10, para. 5-25 (15 March 1985).
[152]*Id.*
[153]Dep't of Navy, JAGNOTE 5800, JAG:204, para. 0133 (17 July 1984).
[154]*Compare* United States v. Martin, 5 M.J. 888 (N.C.M.R. 1978) (waiver of juvenile record not admissible) *with* United States v. Honeycutt, 6 M.J. 751 (N.C.M.R. 1978) (record of juvenile adjudication not admitted but judge properly admitted a statement by the accused as to the experimental use of marijuana).
[155]*See* United States v. Cook, 10 M.J. 138 (C.M.A. 1981).
[156]United States v. Krewson, 8 M.J. 663 (A.C.M.R. 1979).
[157]United States v. Weaver, 1 M.J. 111, 115 (C.M.A. 1975).
[158]United States v. Cook, 10 M.J. 138 (C.M.A. 1981).

Article 15s. It is now clear that a properly-imposed,[159] completed, and filed[160] Article 15 is admissible during the sentencing stage of the trial, even if there is no indication that the accused consulted with a lawyer or waived the right to such contact.[161] The Court of Military Appeals noted in *United States v. Mack*[162] and *United States v. Negrone*[163] that an incomplete or illegible record of punishment is inadmissible, except where the omission has been accounted for elsewhere in the form or by independent evidence,[164] or is not essential to the validity of the Article 15 proceedings.[165] Even if the form is sufficient on its face, but the accused establishes by independent credible evidence that there was an essential omission or irregularity in the procedure for imposing punishment, the record of punishment

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[159]United States v. Gilford, 16 M.J. 578 (A.C.M.R. 1983) (per curiam). The court held that the rear detachment commander at Fort Bragg had UCMJ authority over a member of a battalion that was part of the unit that had deployed to the Sinai. The captain who commanded the detachment "assumed command of the organization and was the individual that higher authority looked to for the administration and discipline of the organization and those individuals who did not deploy with the parent battalion."

[160]United States v. Cohan, 20 C.M.A. 469, 43 C.M.R. 309 (1971). *See also* United States v. McGill, 15 M.J. 242 (C.M.A. 1983) (when an Article 15 is lost, it may not be introduced through the testimony of an investigator who did not have personal knowledge of the Article 15). *Cf.* United States v. Yong, 17 M.J. 671 (A.C.M.R. 1983) (oral testimony as to imposition of Article 15 not admissible during sentencing; the court read the MCM and regulation as saying the evidence must be in writing and filed under the regulations in the personnel files).

Information on how to obtain Article 15s and other documents from the restricted fiche are found in the Trial Counsel Forum, Sept. 1984, at 14.

[161]United States v. Wheaton, 18 M.J. 159 (C.M.A. 1984). United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

[162]United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

[163]9 M.J. 171 (C.M.A. 1980) (rejected waiver argument by the government where DA Form 2627 was incomplete as to items 3-6 when there was no evidence that the lack of an objection was made for a tactical advantage).

[164]United States v. Mack, 9 M.J. at 324 (C.M.A. 1980).

[165]United States v. Blair, 10 M.J. 54 (C.M.A. 1980) (failure to complete block 8 on DA Form 2627 does not effect admissibility when the accused indicated that he did not appeal the Article 15); United Sttes v. Carmans, 10 M.J. 50 (C.M.A. 1980) (failure to sign block 12 as to notice of action taken on appeal does not effect admissibility). *But see* United States v. Eberhardt, 13 M.J. 772 (A.C.M.R. 1982) (Article 15 inadmissible even though two of four allegations of failure to repair did not have the language without authority); United States v. McGary, 12 M.J. 760 (A.C.M.R. 1981) failure to object to absence of an entry in block 8 of DA Form 2627, is waiver, United States v. Dyke, 16 M.J. 426 (C.M.A. 1983) (Article 15 lacking four required signatures—legible or inadmissible despite defense counsel's failure to object); United States v. Cisneros, 11 M.J. 48 (C.M.A. 1981) (failure to comply with clear and unambiguous filing requirements requires suppression on objection); United States v. Guerrero, 10 M.J. 52 (C.M.A. 1980) (failure of judge advocate to complete block 10 as to mandatory review on appeal is fatal as to admissibility); United States v. Burl, 10 M.J. 48 (C.M.A. 1980) (omission of "essential information as to appellate action" fatal); United States v. Gordon, 10 M.J. 31 (C.M.A. 1980) (no appellate action shown on appeals section of form fatal when accused appealed Article 15 on DA Form 2627).

will not be admissible.[166] When some of the essential information is missing, such as the substance of the appeal, the military judge may not make an inquiry of the accused as to the missing items or ambiguities on the documents themselves.[167]

The Court of Military Appeals held that the failure to object to a fatal or essential defect on Article 15 which was obvious waives the objection[168] except when there is "plain error" which materially prejudices the substantial rights of the accused.[169]

Vacations of punishment under Article 15 are admissible in evidence.[170] The "normal inference" that the sentencing authority may make is that the vacation was the result of misconduct by the accused.[171] Unless contrary evidence is offered, there is a presumption that the vacation was preceded by "an opportunity to appear" and "to rebut any derogatory or adverse information" when the punishment falls within Article 15(e)(1)-(7).[172] Even if the punishment does not fall within that portion of Article 15, there is a lawful presumption that the vacation was accomplished while affording the accused the two minimum due process requirements mentioned above.[173] The burden is on the defense counsel to make a specific objection that "the vacation of suspension was not preceded by the notice and opportunity to reply demanded."[174] At such "vacation proceeding," the accused does not have the right to counsel.[175]

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[166]United States v. Mack, 9 M.J. 300, 320-24 (C.M.A. 1980).

[167]United States v. Sauer, 15 M.J. 113 (C.M.A. 1983), *overruling* United States v. Mathews, 6 M.J. 357 (C.M.A. 1979); United States v. Spivey, 10 M.J. 7 (C.M.A. 1980). *See also* United States v. Cowles, 16 M.J. 467 (C.M.A. 1983) (applying *Sauer* to guilty plea case).

[168]United States v. McLemore, 10 M.J. 238 (C.M.A. 1981) (Fletcher, J., dissenting) (the election of the accused for court-martial or proceedings under Article 15 did not appear on Navy form in the case). The majority noted: "The Military Rules of Evidence now have taken a very expansive view of waiver by failure to object. *See* Rule 103(a)(1)." *Id.* at 240 n.1. *See also* United States v. Beaudion, 11 M.J. 838 (A.C.M.R. 1981) (the failure to object to illegible signature in block 7 will be waiver); MCM, 1969, para. 75*b*(2) (C5, 1 Apr. 1982): "Objections not asserted are waived." This statement is now found in R.C.M. 1001(b)(2.

[169]United States v. Dyke, 16 M.J. 426 (C.M.A. 1983).

[170]United States v. Covington, 10 M.J. 64 (C.M.A. 1980). *See* United States v. Stewart, 12 M.J. 143, 144 n.2 (C.M.A. 1981): "[S]ince appellant appeared in court in the uniform of a Specialist Four and testified concerning his unawareness of the reduction in grade, the military judge arguably was on notice to inquire further into compliance with the required procedures." In essence, the presumption had been rebutted.

[171]United States v. Covington, 10 M.J. at 65, 68.

[172]*Id.* at 68 (citing MCM, 1969, para. 134).

[173]10 M.J. at 68.

[174]*Id.*

[175]*Id.* at 66.

In addition to rejecting right to counsel at Article 15 proceedings or vacation proceedings under Article 15, the courts have rejected arguments that imposition of an Article 15 on board ship violates due process.[176]

Written Reprimands. Written reprimands or admonitions that are properly filed in accordance with the service regulations are admissible in evidence as personnel records. In *United States v. Cook*,[177] the Court of Military Appeals held that a record of a procedure withholding adjudication after a plea of guilty was a record of a "civil court conviction" within the meaning of the Air Force regulation.

In *United States v. Boles*,[178] the court held that an administrative reprimand for an arrest less than a week before the appellant's court-martial for larceny could not be admitted. According to the trial counsel, the reprimand was placed in the appellant's file "to aggravate the case." "We conclude the defense has shown that this reprimand was issued by the commanding officer and placed in his UIF for the purpose of influencing the appellant's present court-martial."[179] In any event, the court indicated that such a reprimand did not seem to be a "judicious or effective use of this mnagement tool."[180] In *United States v. Hagy*,[181] the court held that a letter of reprimand initiated three days prior to the trial was inadmissible in evidence during the sentencing stage. In *United States v. Brown*,[182] the court indicated that personnel records cannot be used as a back-door means of introducing otherwise inadmissible, unfavorable information about the accused.

In *United States v. Hood*,[183] the court rejected the defense claim that a letter of reprimand was not admissible since the accused did not commit the act alleged. The court stated:

> We agree with the ruling of the military judge that such argument constitutes an impermissible collateral attack on the LOR. The defense may not litigate at trial the under-

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[176]*See* United States v. Lecolst, 4 M.J. 800 (N.C.M.R. 1978); United States v. Penn, 4 M.J. 879 (N.C.M.R. 1978).

[177]10 M.J. 138 (C.M.A. 1981).

[178]11 M.J. 195 (C.M.A. 1981).

[179]*Id.* at 196.

[180]*Id.* at 198.

[181]12 M.J. 739 (A.F.C.M.R. 1981).

[182]11 M.J. 263 (C.M.A. 1981). *Compare* United States v. Jaramillo, 13 M.J. 782 (A.C.M.R. 1982) *with* United States v. Warren, 15 M.J. 776 (A.C.M.R. 1983). A.C.M.R. panels split on how far military judge responsibility goes in establishing *Booker* compliance.

[183]16 M.J. 557 (A.F.C.M.R. 1983).

> lying dereliction for which the reprimand was issued, for it is a collateral issue. . . . An accused may mitigate or explain a LOR or similar document during sentencing . . .; however, contesting the merits of whether the LOR was properly issued is not a matter in extenuation or mitigation and is not allowable.[184]

Aggravation. In addition to introducing evidence from the charge sheet, personal data, including Article 15s, and prior convictions, the prosecution may have other evidence in aggravation. Rule 1001(a)(4) provides:

> *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. . . .

This language is taken from *United States v. Vickers.*[185] The discussion paraphrasing Federal Rule of Criminal Procedure 32 provides some examples, but the rule is not all inclusive:

> Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.[186]

The Manual does not explicitly state that evidence in aggravation may be presented whether or not there has been a plea of guilty, but this may be implied in light of the prior Manual provisions.[187] There

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[184] *Id.* at 559.

[185] 13 M.J. 403 (C.M.A. 1982).

[186] R.C.M. 1001(a)(4) discussion.

[187] MCM, 1984, at A21-62 provides:

> Subsection (4) makes clear that evidence in aggravation may be introduced whether the accused pleaded guilty or not guilty, and whether or not it would be admissible on the merits. This is consistent with the interpretation of paragraph 75*b*(3) (later amended to be paragraph 75*b*(4) of MCM, 1969 (Rev.) by Exec. Order No. 12315 (July 29, 1981) in *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982). *See also* U.S. Dep't of Justice, Attorney General's Task Force on Violent Crime, Final Report Recommendation 14 (1981); Fed. R. Crim. P. 32(c)(2)(B) and (C). This subsection does not authorize introduction in general of evidence of bad character or uncharged misconduct. The evidence must be of circumstances directly relating to or resulting from an offense of which the accused ha been found guilty. *See* United States v. Rose, 6 M.J. 754 (N.C.M.R. 1978), *pet. denied*, 7 M.J. 56 (C.M.A. 1979); United States v. Taliaferro, 2 M.J. 397 (A.C.M.R. 1975); United States v. Peace, 49 C.M.R. 172 (A.C.M.R. 1974).

is no requirement for the evidence to be admissible on the merits.[188] The failure to object to improper evidence in aggravation is a waiver.[189] There are many other factors that might be considered by the sentencing authority which would not be admissible in the case-in-chief, but the rules of relevancy set forth in Rules 401 and 403 apply.

Method of Proving Aggravating Factors. Before discussing the evidence that might be admitted, the methods of proving matters in aggravation should be explored. Prior confictions and personnel records may be introduced through properly authenticated documents. Matters in aggravation or extenuation and mitigation could be presented by witnesses called by either side or stipulation by the parties. When there has been a plea of guilty, the government may require a stipulation of fact.[190] The stipulation might encompass matters in aggravation or what the trial counsel might seek to bring out in rebuttal. When there is an agreement as to the facts but a disagreement in admissibility, the parties could enter into a stipulation, allowing the judge to determine admissibility.

Impact on Victim or Family. In *United States v. Wilson*,[191] the Army Court of Military Review held that an expert witness could testify as to the pain and suffering undergone by the victim of an aggravated assault with a means likely to produce grievous bodily harm. The testimony was as follows:

> Q. Captain Caldwell, I'm going to read to you two sets of facts and I want you to assume that those are true. One is that the victim in this case was choked by means of—of the use of hands, and two, that the victim lost consciousness, bled from the ears, evacuated her bowels and bladder, and her face became swollen and discolored. Now, based upon those facts, do you have an opinion, as to what this combination of symptoms, in relationship to a manual choking, signifies?
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> A. Taken in that sequence, it signifies that the patient was short of oxygen; you could not breathe. And due to that shortage of oxygen, she lost

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[188] *Id.*

[189] *United States v. Taliferro, 2 M.J. 397 (A.C.M.R. 1975); United States v. Peace, 49 C.M.R. 172 (A.C.M.R. 1974). See also* R.C.M. 1001(b)(1)(2).

[190] CM 442268 (A.C.M.R. 9 Aug. 1982).

[191] United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984).

> sphincter tone, evacuating her bowels and bladder, and probably, the increased pressure from the manual choking caused her to rupture her ear drums and to bleed from the ears. All of those things are high on the scale of seriousness in a life and death situation.

In *Unired States v. Marshall*,[192] the court held in a contested case that it was proper for the prosecutor to call in the victim of the rape to testify in pre-sentencing proceedings about "the effects on her lifestyle which resulted directly from the rape."

In *United States v. Pearson*,[193] the court held that the victim's father invaded the providence of the jury when he made an emotional statement as to the value of his son and disagreed with the jury verdict finding the accused guilty of negligent homicide. The accused was given the maximum punishment. The dictum in the case is important for future cases.

> [T]he Government [is] permitted to introduce independent evidence that the victim was an outstanding person and Marine, and that his family and community were devastated by his loss.
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> [W]e agree that courts-martial, like their civilian-judge counterparts, can only make intelligent decisions about sentences when they are aware of the full measure of loss suffered by all of the victims, including the family and the close community. This, in turn, cannot be fully assessed unless the court-martial knows what has been taken. Thus, trial judges, in their sound discretion, may permit counsel to introduce evidence of the character of the victim. . ...

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[192]14 M.J. 157 (C.M.A. 1982). United States v. Thill, CM 444507 (A.C.M.R. 13 July 1984) (although appellant's sexual misconduct with his daughter at an early age could not be prosecuted due to the statute of limiations, it was properly included in a stipulation of fact concerning the charged acts of sexual misconduct of recent vintage; appellant freely agreed to the stipulation and raised no objection to it and this evidence would have been admissible on the merits under MRE 404(b) as well as during presentencing as an aggravating fctor); United States v. Shreck, 10 M.J. 563 (A.F.C.M.R. 1980) (after plea of guilty, it was permissible for the prosecution to admit evidence of mental examination of the victim of sodomy and indecent acts on child under sixteen which showed the victim was seriously disturbed and may have permanent damage). *See also* Note, *The Admissibility of Rape Trauma Evidence*, Trial Counsel Forum, Oct. 1983, at 2.

[193]17 M.J. 149 (C.M.A. 1984).

> Emotional displays by aggrieved family members, though understandable, can quickly exceed the limits of propriety and equate to the bloody shirt being waved. On the other hand, substantially the same information, in factual, written form such a a presentence report or, here, the victim's Service Record Book, provides little inflammatory risk.[194]

In *United States v. Hammond*,[195] the court held that the prosecution could introduce in aggravation testimony relating to the general effect of rape trauma from a witness who neither interviewed nor counseled the victim of the offense.

Effect and Amount of Drugs. In *United States v. Corl*,[196] a contested case, a witness was permitted to testify during the sentencing stage as to the effects of the drugs the accused had been convicted of transferring and selling. The military does not have in its statute a permissible inference that specific amounts of drugs are for the purpose of sale. Even so, inferences are based on not only statutes but also common law experiences. One can argue from the amount of drugs seized or sold that it was not solely for personal use.[197] "Through the use of presumptions, certain inferences are commended to the attention of jurors by legislatures or courts."[198] They may also be "well founded in history, common sense and experience."[199]

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[194] *Id.* at 152-53.

[195] 17 M.J. 218 (C.M.A. 1984) (Cook, J.). Judge Fletcher concurred; Chief Judge Everett found harmless error. *See also* Note, Trial Counsel Forum, *supra* note 176.

[196] 6 M.J. 914 (N.C.M.R.), *aff'd*, 8 M.J. 47 (C.M.A. 1979). *See* United States v. Needham, 19 M.J. 640 (A.F.C.M.R. 1984) (accused convicted of distributing LSD the prosecution may admit a periodical tracing the history, use and effects, both physical and psychological, or hallucinogens and marijuana); United States v. Ross, ACM 24295 (A.F.C.M.R. 11 July 1984) (appellant's threat to kill the unknown informant involved in the drug investigation which nabbed appellant was improper aggravation evidence because the threat was not "directly related" to the charged offense, in that the drug offenses had already occurred, and the threat was not a "repercussion" of the offenses; however, court found no prejudice where appellant had used marijuana between 200 and 250 times, distributed marijuana on at least 50 occasions, often to subordinates, and used and distributed cocaine); United States v. Reynolds, ACM 444270 (A.F.C.M.R. 29 Feb. 84) (after appellant's conviction for distribution of marijuana, the trial counsel was properly allowed to present in aggravation the testimony of the undercover MPI agent concerning appellant's uncharged past and future drug sales related to appellant's charged distribution of drugs to the undercover agent).

[197] New York v. Allen, 442 U.S. 140, 169 (1979).

[198] *Id.*

[199] *Id.*

In *United States v. Vickers*,[200] the court held the prosecution could introduce evidence in a pre-sentence hearing that the amount of heroin that the accused transferred could have been divided into 37-42 usable quantities.

An issue that arises frequently in drug cases concerns statements by the accused to the undercover agent about other drug transactions. The courts would generally admit evidence that, at the time of the charged drug transaction, the accused stated he would sell the same drug at another specified time.[201] When there is no specified date for the future transaction, the evidence has been held to be inadmissible[202] When the statement by the accused is to sell a different drug at an unspecified time, these statements have also been held to be inadmissible.[203] In *United States v. Acevedo*,[204] Judge Coker held that two statements by the accused outlining, in detail, the role the appellant played as a drug dealer over a five month period was inadmissible even though there was no objection. Because of plain error, the court did not find waiver. The court reassessed the sentence to that which it had been earlier reduced by the convening authority.

The cases above were not concerned with the reliability of the evidence because the statements were either part of a statement of the accused which was not challenged under the fifth amendment substantive doctrines or a statement to an undercover agent. Additionally, the court did not discuss the rules of evidence since the hearsay rules had been satisfied. Additionally, there was no question concerning the right of confrontation or cross-examination. Even if reliability, confrontation and satisfaction of the rules are present, arguably the evidence should not be admitted. The sentence should be individualized to the accused and based upon the accused's rehabilitative potential. Statements as to past or future conduct may not satisfy either of these. If we analogize this issue to the question of whether the accused committed perjury during the case in chief, there may be a satisfactory result. Court members could consider evidence of prior sales or statements of an intent to make a future sale of a drug not charged on a specified date if cautionary instructions were given to court members. They must find beyond a pre-

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[200]CM 442268 (A.C.M.R. 9 Aug. 1982).

[201]United States v. Doss, SPCM 1955 (A.C.M.R. 5 Mar. 1984).

[202]United States v. Von Boxel, SPCM, 18605 (A.C.M.R. 9 Sept. 1983). *But see* United States v. Pooler, C.M. 444766 (A.C.M.R. 7 Sept. 1984); United States v. Reynolds, C.M. 444270 (A.C.M.R. 25 Feb. 1984).

[203]*See, e.g.*, United States v. Harris, C.M. 444086 (A.C.M.R. 27 Dec. 1983).

[204]C.M. 444146 (A.C.M.R. 14 May 1984).

ponderance of the evidence that the accused did make such a statement or sale at which time they could consider the statement as to the impact on the rehabilitative potential of the accused.

Since the Manual language is taken from *Vickers*, the question is whether the evidence sought to be introduced "directly relates" to the circumstances surrounding the instant offense. There is no requirement that the evidence be admissible on the merits because, generally, it has nothing to do with guilt or innocence. Certainly, if there was a contested case and the evidence was admitted in the case-in-chief, it would be admissible in aggravation. Rule 404(b) cannot be the standard. This might be a good general rule, but 404(b) is very difficult to apply in the vacuum of just the fact of uncharged misconduct supposedly committed by the accused. It would be impossible to show the importance of the evidence to the prosecution, and the issue of whether the prosecution has alternate evidence would not come into play. Finally, the party introducing the evidence is trying to show the character of the defendant and not that it is logically and legally relevant to the crime charged.

Most of the attacks on this evidence have been on the basis of the Manual rules and not on the basis of the unreliability of the evidence that the prosecution seeks to admit. The latter is important because the accused has a constitutional right to the admission of accurate information.[205]

Seeking admission of statements made by the accused either at the time of the crime or at another time is important. These statements show the propensity of the accused towards future conduct, his attitude towards crime, and his chance of rehabilitation. The defense will have prior notice of evidence brought out through prosecution witnesses and will be able to check the accuracy of their information.

Under the concept of punishment fitting the offense, and individualized punishment, it is appropriate that as much information as possible be given to the sentencing authority, provided the information is reliable. As a federal statute declares: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing appropriate sentence."[206] The evidence that is brought out by the prosecution is subject to rebuttal as to accuracy, and the defense may attempt to explain the material.

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[205]Townsend v. Burke, 334 U.S. 736 (1948).

[206]18 U.S.C. § 3577 (1982).

Financial Matters. It would be permissible for the trial counsel to establish the value of the property that the accused stole, including the black-market value of these same items.[207] Then, trial counsel could establish actuarially the value of the accused's retirement income and contrast that to the accused's ill-gotten gains if invested in a prudent manner.[208]

Failure to Cooperate. In *Roberts v. United States*,[209] it was held to be proper for the prosecution to introduce evidence of numerous refuasls of the accused to cooperate with the government. The accused did not attempt at trial to explain, prior to sentencing, that the refusals were based on fears of retaliation or the invocation of fifth amendment rights. This would have application in the military when the accused was asked to cooperate prior to trial, but refused. During cross-examination of a sworn statement of the accused, it would be permissible to ask the accused if he or she would be willing to cooperate with the government in the future.

Impact on Mission and Discipline. In *United States v. Penn*,[210] the court held that the prosecution could introduce evidence that the accused was found in possession of the marijuana in a restricted area on the ship. When asked to lower his pants so that the agents could obtain the drugs, the accused did not obey the order. It would be erroneous, however, for the prosecution to introduce evidence that the accused wsa denied a security clearance or had requested a discharge for political reasons.[211] The denial has no impact on discipline but, depending on the number of individuals with that particular clearance, there may be an impact on the mission. *Penn* does not

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[207]United States v. Hood, 12 M.J. 890 (A.C.M.R 1982).

[208]*Id.*

[209]445 U.S. 552 (1980). Conversely evidence the accused cooperated is admissible during sentencing. *See, e.g.*, United States v. Thomas, 11 M.J. 388 (C.M.A. 1981).

[210]4 M.J. 879, 885 (N.C.M.R. 1978). *See also* United States v. Fitzhugh, 14 M.J. 595 (A.F.C.M.R. 1982) (the accused's removal from a missile crew as a result of a conviction for a drug offense and its adverse effect on the military mission admissible as evidence in aggravation).

[211]United States v. Garza, 20C.M.A. 536, 43 C.M.R. 376 (1971) (held prejudicially erroneous in trial by judge alone). *See also* United States v. White, 4 M.J. 628 (A.F.C.M.R. 1977), *aff'd on other grounds*, 6 M.J. 12 (C.M.A. 1978) (contrary to plea the accused was convicted of two specifications of transferring heroin; the court held it was error for the military judge to permit the prosecution to introduce over objection evidence that the heroin transferred could be apportioned into thirty-seven "hits"; court said that this evidence had "no logical function" when not in rebuttal to defense evidence during sentencing); United States v. Helliker, 49 C.M.R. 869 (N.C.M.R. 1974) (prosecution may not in the first instance introduce evidence that the accused is a poor service member).

seem to meet the new standard set forth in the Discussion of a "significant adverse impact on the mission, discipline, or efficiency of the command."[212]

*Uncharged Misconduct.*The prosecution may want the military judge to give an instruction that the jury may consider matters brought out in the case in chief during the sentencing phase of the trial. The 1969 Manual[213] changed the 1951 Manual[214] rule that an instruction was required that this evidence could not be considered in sentencing. The prime example of such evidence is uncharged misconduct.[215]

The admissibility of uncharged misconduct depends upon a balancing of the probative danger versus probative value in sentencing. Rule 403 serves as a guide to the military judge in determining admissibility. The fact that the accused has pled guilty is not, by itself, a reason to prohibit the prosecution from admitting such evidence. One strategy of defense counsel would be to plead guilty to present a sterile picture to the sentencing authority. The prosecution may want to have the evidence presented in person or to present it by way of a stipulation which was required as part of a pretrial agreement in connection with the plea of guilty.

From a policy point of view, the sentencing authority should be presented with evidence to allow that authority to make an elightened decision as to the sentence. Two appellate courts have taken the position that, if the only reason for the evidence is to establish that the accused was a bad person, the evidence is not admissible.[216] The 1984 Manual continues the 1969 rule.

> (f) *Additional matters to be considered.* In addition to matters introduced under this rule, the court-martial may consider—
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> . . . .
>
> (2) Any evidence properly introduced on the merits before findings, including:
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> (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; . . .[217]

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[212]R.C.M. 1001(a)(4) discussion.

[213]*See* United States v. Worley, 19 C.M.A. 444, 42 C.M.R. 46 (1970).

[214]MCM, 1951, para. 76*a*(2).

[215]United States v. Hutchins, 4 M.J. 796 (N.C.M.R. 1978); United States v. Mandurano, 1 M.J. 728 (A.F.C.M.R. 1975).

[216]United States v. Martin, 17 M.J. 899 (A.F.C.M.R. 1983); United States v. Taliaferro, 2 M.J. 397 (A.C.M.R. 1979) (cited in *Vickers* for improper ruling).

[217]R.C.M. 1001(f).

Accused's Truthfulness. The findings of the court may reflect that the factfinder did not believe the accused. In such a case, the prosecution may want an instruction that the sentencing authority may consider in aggravation that the accused made a materially false statement while under oath in the present trial. In *United States v. Grayson*,[218] the Supreme Court held that the trial judge may consider the accused's truthfulness in determining an appropriate sentence. The accued's demeanor on the witness stand "can often provide useful insights into an appropriate disposition."[219] The testimony may also be "probative of his attitudes toward society and prospects for rehabilitation. . . ."[220] The majority rejected the accused's due process arguments[221] that the practice by the trial judge would "chill" the accused's constitutional right to testify on his own behalf.[222] The Court noted:

> The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath. Further support . . . is found in an important limitation on a defendant's right to the assistance of counsel: Counsel ethically cannot assist his client in presenting what the attorney has reason to believe is false testimony. . . . Assuming, *arguendo*, that the sentencing judge's consideration of defendant's untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible.[223]

The dissenters raised two issues: first, that the judge's perception that the testimony was untruthful is not reviewable;[224] and second, that there are "no limitations or safeguards to minimize a defendant's rational fear that his truthful testimony will be perceived as false."[225] They suggested that the last objection would be met if the accused's testimony is considered "only when [the judge] is convinced beyond a reasonable doubt that the defendant intentionally lied on material issues of fact . . . [and] the falsity of the defendant's testimony [is] necessarily established by the finding of guilty."[226]

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[218]438 U.S. 41 (1978) (Per Burger, C.J., in which White, Blackmun, Powell, Rehnquist, & Stevens, JJ., joined). Justice Stewart filed a dissenting opinion in which Justices Brennan and Marshall joined.

[219]*Id.* at 50.

[220]*Id.*

[221]*Id.* at 52-54.

[222]*Id.*

[223]*Id.* at 54.

[224]*Id.* at 56-57.

[225]*Id.* at 57.

[226]*Id.* at 57 n.4.

In the military court-martial, the first objection is met since the courts of military review have the authority to make findings of fact.[227] Thus, the decision of the fact-finder is reviewable. Whether the second is met depends on the instructions to the jury. The military judge may instruct the court members that they may consider the defendant's lies or perjury as a matter in aggravation since the accused does not have the right to lie to effect the determination of guilt or innocence.

Two proposed instructions that would satisfy the recent cases of the Court of Military Appeals[228] are as follows:

> It may be that you have concluded in your deliberations that the accused's testimony was, in some respect, untrue. No person, including the accused, has the right to alter or affect the outcome of a court-martial trial by false testimony. If you are satisfied, convinced in your own mind that the accused has lied to you in his testimony, you may consider this matter in sentencing insofar as it is an indication or not of the accused's rehabilitative potential.
>
> If you find beyond a reasonable doubt that the defendant while under oath today made a material false statement that he did not then believe to be true, you may consider this is a matter in aggravation insofar as it relates to the accused's potential for rehabilitation. A defendant does not have the right to make a false statement to affect the determination of guilt or innocence.

The judge may give either of these instructions after an argument by trial counsel or on his own without a request from counsel.[229]

In a trial by judge alone, the Army Court of Military Review has held that it is permissible for the judge to consider the accused's perjury as a matter in aggravation.[230]

Rehabilitative Potential. Rule 1001(b)(5) provides "The trial counsel may present, by testimony or oral deposition . . . evidence, in the form of opinion, concerning the accused previous performance as a servicemenber and potential for rehabilitation. On cross-

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[227]Article 66, UCMJ, 10 U.S.C. § 866 (1982).

[228]United States v. Cabebe, 13 M.J. 303 (C.M.A. 1982); United States v. Warren, 13 M.J. 278 (C.M.A. 1982).

[229]*Id.*

[230]United States v. Wallace, SPCM 14075 (A.C.M.R. 7 Dec. 1979), *aff'd on other grounds*, 11 M.J. 445 (C.M.A. 1981).

examination, inquiry is allowable into relevant and specific instances of conduct." This is a new provision. The purpose of this provision is to allow a more informed decision to be made by the sentencing authority. The "introduction of evidence of this nature should not be contingent solely upon the election of the defense."[231] It must be noted though that specific instances can only be brought out on cross-examination or through rebuttal by the prosecutor.[232] The defense is not forbidden from introducing specific instances of good conduct.[233]

Capital Case. When the case has been referred as a capital case,[234] the prosecution may seek to introduce matters in aggravation. It may seek to prove that the offense was outrageously or wantonly vile, or both; or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim. The prosecution may also seek to introduce evidence that there is a probability that the accused committed criminal acts of violence that would constitute a threat to society.[235] It may be that part of the accused's confession related the accused's plan to kill others or to have desired to have tortured the victim more. This evidence would not normally be introduced in the case in chief but would be relevant to the imposition of the death penalty.

VIII. DEFENSE EVIDENCE AFTER FINDINGS

The defense counsel has a tremendous burden during the sentencing stage. To properly use the stage, counsel might use the format in Appendix B. The rules after findings[26] are relaxed for the defense as well as the prosecution. The defense may ask to make an opening statement during the presentencing phase to highlight entencing evidence; this is discretionary with the trial judge.[237] Through

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[231]R.C.M. 1001(b)(5) analysis.

[232]*Id.*

[233]R.C.M. 1001(*c*)(1)(B).

[234]R.C.M. 1004. This article does not cover the constitutionality of the death penalty in the military. *See generally* Dawson, *Is the Death Penalty in the Military Cruel and Unusual?*, 31 JAG J. 53 (1980).

[235]R.C.M. 1004(c).

[236]*Compare* United States v. Blau, 5 C.M.A. 232, 17 C.M.R. 232 (1954) (prosecution may introduce specific acts of misconduct in response to specific exemplary acts presented by the defense) *with* United States v. James, 34 C.M.R. 503 (A.C.M.R. 1963) (prosecution may n ot introduce evidence which does not satisfy the hearsay rules); R.C.M. 1001(c)(3); 1001(d).

[237]United States v. Michaud, 48 C.M.R. 379, 395 (N.C.M.R. 1973).

witnesses, including the accused, writings or other evidence, the defense may introduce evidence in mitigtation and extenuation. Matters in mitigation are facts about the accused's background which demonstrate that the accused deserves a lenient sentence. The Manual provides, however, that it does not include evidence extending to a "legal justification or excuse."[238] Where the accused attempts to introduce this evidence, the trial judge may preclude the defense. The reasons, however, for introducing this evidence may vary. For the judge to preclude this testimony may deprive the accused of the right of compulsory process, the argument being that this evidence may cause the fact-finder to reconsider a finding of guilty.

Matters in extenuation are circumstances surrounding the offense of which the accused has been convicted. One court has held that this does not include evidence of an acquittal of an alleged accomplice.[239]

As to testimony of the accused, the military judge must advise the accused of the right to remain silent, or to make a sworn or an unsworn statement.[240] The judge's admonishment to an accused of limited education may deprive the accused of the right to make a statement ot the court members.[241] The accused cannot be cross-examined on an unsworn statement whether or not made through counsel.[242]

Some evidence which was inadmissible prior to findings becomes admissible during the sentencing stage: specific good acts,[243] general good character,[244] potential as to retention,[245] and letters, affidavits, and other writings that would not be admissible prior to findings.[246]

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[238]R.C.M. 1001(c)(1)(A). *See also* United States v. Teeter, 16 M.J. 68 (C.M.A. 1983).

[239]United States v. Raines, 32 C.M.R. 550 (A.B.R. 1962).

[240]R.C.M. 1001(a)(3). *See also* United States v. Hawkins, 2 M.J. 23 (C.M.A. 1976). The court stated in dictum even if it is shown that defense counsel has fulfilled the duties under paragraph 75c(2) [provision prior to R.C.M. 1001(a)(3)], this does not alleviate the requirement imposed on the military judge.

[241]*See* United States v. Jackson, 36 C.M.R. 677 (A.B.R. 1966) (board reassessed the sentence).

[242]R.C.M. 1001(c)(2)(C) (same as 1969 and 1951 Manuals). *See* United States v. King, 12 C.M.A. 71, 30 C.M.R. 71 (1960) (when court member attempted to question the accused's unsworn statement, it was error not to instruct the court members that they must not draw adverse inferences from this method of proof; rehearing on sentence ordered based on the above and improper argument by the prosecutor).

[243]R.C.M. 1001(c)(1)(B).

[244]*Compare id. with* Mil. R. Evid. 404(a).

[245]R.C.M. 1001(a)(1)(A)(v).

[246]R.C.M. 1001(a)(3): "[T]he military judge . . . may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability." This provision is similar to MCM, 1969, para. 75c(3).

While the prosecution may present evidence of the accused's lack of cooperation with law enforcement officials, the defense may want to show such cooperation and the extent to which the accused is still willing to assist the police. It may be that the accused would be reluctant to state in open court the extent of his future cooperation if it involves those whom he knows personally. The defense may ask that the courtroom be closed while the accused testifies about future cooperation. In *United States v. Martinez*,[247] the court held that, under the circumstances of the case, the trial judge abused his discretion in not clearing the courtroom so that the accused could respond to the questions of the judge and the court members as to his willingness to cooperate with law enforcement officials.

As to good character and potential for retention in the service, the defense counsel normally presents a superior, for example, the accused's squad leader, to testify that he has known the accused for a specified time. Assume that a sergeant has been associated with the accused not only professionally but socially. In response to defense counsel's questions, the witness testifies that he would be willing to serve with the accused again in the same unit and that the accused should not be discharged from the service. To determine whether this testimony violates any evidentiary rule, the impact of Rules 701 and 704 on prior case law must be assessed. Rule 701 provides that "the testimony of the witness in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness of the determination of a fact in issue." Rule 704 provides "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

In *United States v. Lucas*,[248] the Army Board of Review held that "the determination of an appropriate sentence is a judicial function of a court-martial and opinion testimony as to an appropriate sentence is incompetent."[249] During the sentencing phase of that court-martial, the defense counsel had called the Article 32 investigating officer and attempted to elicit his previous recommendation

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[247] 3 M.J. 600, 602-04 (N.C.M.R. 1977), *rev'd on other grounds*, 5 M.J. 122 (C.M.A. 1978).

As to the authority of the military judge, *see* United States v. Ault, 15 C.M.A. 540, 36 C.M.R. 38 (1965) (it was not error for the judge to exclude document that the victims did not want to see the accused punished; the result of this case may be different under Rule 702).

[248] 32 C.M.R. 619 (A.B.R. 1962).

[249] *Id.* at 620.

as to the disposition of the case; the law officer sustained the trial counsel's objection. On appeal, the board held that the presentation of this testimony would be tantamount to offering the officer's opinion that any punishment greater than that imposable by special court-martial would be inappropriate because the officer had recommended that the case be resolved in that forum. In holding that such testimony unduly infringed upon the court-martial's judicial function, the board departed from *United States v. Walker*,[250] in which the tribunal held that the law officer erred in disallowing testimony that the accused's company commander and the Article 32 investigating officer both had recommended trial by special court-martial. The board in *Walker* reasoned that, since such evidence arguably suggests that the accused had a "good reputation for efficiency and other traits that go to make a good soldier," it was admissible in mitigation.[251]

One year prior to *Lucas*, in *United States v. Capito*,[252] the board held that the law officer, whose role has since been filled by the military judge, did not err in excluding evidence from the defendant's superiors that he should be retained in the service. The contested evidence consisted of thirteen sworn and unsworn written statements by eleven noncommissioned and two commissioned officers attesting to the superiority of the accused's duty performance. The law officer deleted all statements recommending that the accused be retained in the service. The board held that

> [s]uch a recommendation as to the specific components of an appropriate sentence is not evidence in military courts-martial and when indiscriminately permitted to be used to influence the members of the court in determining a sentence under the guise of mitigation, [it] could constitute an interference with the duties of the court members. . . .[253]

In contrast, the Court of Military Appeals held in *United States v. Robbin*[254] that it was prejudicial error to exclude a superior's testimony that he would be willing to have the accused return to his unit. During the sentencing phase of the court-martial, the defense counsel had attempted to elicit such testimony from the accused's platoon sergeant. The law officer prohibited the witness from

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[250]28 C.M.R. 575 (A.B.R. 1959).
[251]*Id.* at 576.
[252]31 C.M.R. 369 (A.B.R. 1962).
[253]*Id.* at 370.
[254]16 C.M.A. 474, 37 C.M.R. 94 (1966).

responding on the ground that the court-martial's province would thereby be invaded. Appellate defense counsel contended that the law officer erred in view of the typically liberal application of evidentiary rules during sentencing. Citing *Capito*, the government argued that the platoon sergeant's response would have constituted opinion testimony which was properly excluded. The Court of Military Appeals distinguished *Capito*, because the contested evidence in that case consisted of written statements which were properly excluded, since their accuracy could not be tested through cross-examination. In *Robbins*, on the other hand, "the witness was before the court, and the underlying reasons for his answer could be thoroughly tested" by the trial counsel.[255] The court also noted that an affirmative answer by the witness would relate to the accused's character, and that under *Lucas*, this "[d]irect testimony as to the witness' opinion of the accused's character is admissible."[256]

There is little apparent difference between the testimony in *Robbins* that the accused should be returned to his unit and testimony that the defendant should be retained in the service. The court in *Robbins* implicitly held that an individual may testify as to whether the accused should or should not be discharged. On the other hand, it is error for a superior to testify that the accused should receive the maximum imposable sentence, since the assessment of penal sanctions is a judicial function properly exercised by the court-martial.[257] It may be concluded that, rather than abolishing the opinion rule, the revised Military Rules of Evidence allow the judge to exercise discretion. Rules 701 and 704 must both be satisfied before opinion evidence on retention is admissible. Even if each rule is satisfied, the judge may exclude the evidence pursuant to Rule 403, provided that the accused's right to present evidence is not thereby impinged.[258] One might contend that testimony reflecting the opinion that the accused should not be discharged or should be returned to his prior unit does not violate Rule 704, since that provision specifically allows the introduction of evidence relating to the ultimate issue; when a discharge is an authorized punishment, the question of retention may be characterized as an ultimate issue.

A proper foundation for this kind of opinion or reputation evidence will satisfy the personal knowledge portion of Rule 701. Such testimony, however, may violate that portion of Rule 701 which requires that the opinion be "helpful to clear understanding of the

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[255]*Id.* at 478, 37 C.M.R. at 98.
[256]*Id.*
[257]United States v. Jenkins, 7 M.J. 504 (A.F.C.M.R. 1979).
[258]Chambers v. Mississippi, 410 U.S. 284 (1973).

testimony of the witness or the determination of a fact in issue." On the other hand, the testimony may contribute to a clear understanding and save the time required for a witness to testify as to the details that may support the same conclusion, and it would be helpful in revealing the witness' perspective. The witness' opinion, however, may be based on his perception of the accused's character rather than full knowledge of the evidence introduced on the merits. To expose this perspective in an aggravated assault case, for example, the prosecution could ask whether the accused was responsible for the assault or whether he acted in self-defense, in order to reveal a misconception that the accused was acting in self-defense. The prosecution may also inquire into the witness' knowledge of the nature of the injuries. Any unfamiliarity with the extent of the injuries would demonstrate that his opinion as to whether the accused should be retained in the service is based upon character evidence without a consideration of the true facts and circumstances surrounding the alleged offense. In many instances, witnesses premise opinions regarding retention on erroneous information about the offense. Proper questioning may reveal whether the witness has a thorough knowledge of the case, or whether his opinion is based solely on the good character of the accued or on an erroneous understanding of the offense.

Another facet that should be explored by both counsel before and during the trial is a comparison of the accused with other soldiers with the same experience and grade in the unit. Some character witnesses feel that the lawyers are asking for information similar to that on performance reports. Most performance and efficiency reports are inflated to the extent that the forms have been revised to obtain realistic appraisals of performance. Prior to trial or during trial, counsel may ask a witness to rate the accused in comparison to all of those the witness has known of the same grade and experience. Where would the witness rank the accused with other similar persons? Or, to speak in terms other than those appearing on performance reports, the witness might be asked: "If the choice was yours, who would you like in the unit, the accused, any person from the personnel pipeline, a person like the accused, or a vacancy?"

The opinion rule laudably encourages witnesses to testify in concrete terms related to their firsthand perceptions. There are, however, two dangers to opinion evidence relating to the question of whether the accused should be discharged. First, the jury may infer that the evidence is based not only upon reputation and opinion evidence as to the defendant's character, but also upon the facts of the case. Second, opinion evidence may usurp the court's responsi-

bility to determine a proper sentence. These respective dangers can be curbed by effective cross-examination and by an instruction that the court may find the witnesses credible and the facts reliable without accepting the inferences or opinions of the witnesses. Since the potential prejudicial impact of opinion testimony can be controlled, it is proper under the new evidentiary rules to permit a witness to testify as to the desirability of retaining the accused in the service or returning him to his prior unit. When such testimony is admitted, the military judge should allow extensive cross-examination, and, upon request, he should instruct the members of the court-martial as to the conclusions and inferences they may properly draw from such testimony.

IX. PROSECUTION REBUTTAL AFTER FINDINGS

As in the case in chief, the defense counsel must be aware of the possibilities for rebuttal after the defense presents its case during the sentencing stage of the court-martial. The witnesses, including the accused, may open the door for the prosecution to present a number of items that would not be admissible in sentencing absent the evidence presented by the defense during sentencing. The defense may not leave the sentencing authority with the impression that the accused had not been in past trouble or to misrepresent the accused's prior record. When the defense does, the prosecution may introduce evidence that was not previously admissible, *e.g.*, prior convictions,[259] Article 15s, other performance ratings,[260] and

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[259]United States v. Hamilton, 20 C.M.A. 91, 42 C.M.R. 283 (1970) (prior civilian conviction not admissible under 1951 Manual was admissible in rebuttal); United States v. Plante, 13 C.M.A. 266, 32 C.M.R. 266 (1962) (conviction more than six years old not admissible under the Manual but admissible in rebuttal to evidence of good character during the same period of time and which tended to show the accused's honesty, integrity, and general good character); United States v. Marshall, 44 C.M.R. 727 (N.C.M.R. 1971) (when the accused states he has no other prior conviction other than one admitted by prosecution, it is permissible for the prosecution to cross-examine and to admit other convictions. Court held that no limiting instruction required to their use solely for impeachment). *But cf.* United States v. Sisk, 45 C.M.R. 7353 (A.C.M.R. 1972) (improper to cross-examine as to conviction not shown to be final and valid when the appellant "did not claim to have a good military record, that he had never been in trouble, that he never previously committed a crime, or that he had never been tried by court-martial").

[260]United States v. Oakes, 3 M.J. 1053 (A.F.C.M.R. 1977). When the accused introduces some performance records, the military judge does not abuse his discretion in asking that all in the personnel records be admitted.

specific acts of misconduct,[261] requests for administrative discharge,[262] or aggravating facts.[263] When evidence has been accidentally presented, the defense may ask that it be stricken.

> As the Government here contends, were we to adopt a contrary view, an accused would occupy the unique position of being able to "parade a series of partisan witnesses before the court"—testifying at length concerning specific acts of exemplary conduct by him—without the slightest apprehension of contradiction or refutation by the opposition.[264]

In *United States v. Strong*,[265] the court held that it was not an abuse of discretion for the military judge to allow the prosecutor to cross-examine the accused about an inadmissible Article 15 received in June 1979. The accused testified about certain achievements made during the time he was in Germany, *i.e.*, he had received the good conduct medal for the period of September 1978 through September 1983, an honorable discharge at the termination of his prior enlistment; and he had reenlisted in March 1982.

> There is no doubt that trial counsel's question would have been proper if the accused had testified that he had never been disciplined during his prior enlistment; however, defense counsel was astute enough to avoid such testimony. The whole tenor of the evidence introduced by the accused was that he had been an exemplary soldier during that time period.
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> The defense must accept responsibility not only for the specific evidence it offers in mitigation, but also for the reasonable inferences which must be drawn from it.[266]

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[261]*See* United States v. Blau, 5 C.M.A. 232, 17 C.M.R. 232 (1954) (In rebuttal to evidence of specific acts, prosecution witness could testify that the accused's character was poor with respect to trustworthiness and honesty, and he has a trouble-maker. Court member asked for basis of opinion. Held it was permissible cross-examination. Although not stated, the court member could test the basis for opinion); United States v. Ledezma, 4 M.J. 838 (A.F.C.M.R. 1978) (accused made an unsworn statement as to regret for committing crime and resolved never to repeat misconduct; proper for prosecution to introduce evidence that the accused had told his supervisor that if he found who reported him he would "get a contract on him"); United States v. Jeffries, 47 C.M.R. 699 (A.F.C.M.R. 1973).

[262]*See* United States v. Pinkney, 22 C.M.A. 595, 48 C.M.R. 219 (1974) (implicit in dictum); *compare* Mil. R. Evid. 410.

[263]*See* United States v. Clark, 49 C.M.R. 192, 197 (A.C.M.R. 1974).

[264]*Blau*, 17 C.M.R. at 244.

[265]17 M.J. 263 (C.M.A. 1984).

[266]*Id.* at 266-67.

In *United States v. Stark*,[267] the accused introduced, in mitigation, evidence of his good performance. By doing so he opened the door for the prosecution to show that his duty performance was not that good.

> The obvious adverse effects upon duty performance attendant to marihuana usage while engaged in the same is indisputably relevant to character of duty performance. . . . *Ergo*, the government's rebuttal evidence of on duty marihuana usage was admissible for the limited purpose of rebutting otherwise mitigating evidence of outstanding duty performance.[268]

The prosecution may seek to impeach character witnesses by cross-examining them about prior convictions, arrests, and instances of misconduct by the accused. To rebut favorable character evidence, the witnesses may also be impeached through other methods, such as prior inconsistent statements, bias towards the accused, and their own prior convictions. When the accused takes the stand to make a sworn or unsworn statement, he may be subject to specific contradiction. When the accused testifies or makes an unsworn statement as to fact X and other evidence which show that X did not exist, the nonexistence of X would be admissible under the specific contradiction rule. On many occasions, numerous facts are exaggerated inthe accused's favor. The prosecutor should be alert to this and not allow the accused to make indirect references to facts that could not be directly proved. Much of the litigation in this area is over the fact that the prosecutor failed to clarify the ambiguities and inferences from the accused's testimony. Had this been done, the results would probably be different. In *United States v. Thomas*,[269] the accused made the following sworn statement on direct examination: "I recognize the seriousness of my offense [sale of marijuana]." "I regret having committed the offense." "I want to be all that I can be in the Army."

The court held that the trial counsel went beyond the scope of direct examination when he asked: "Who initiated the sale]" "Where did the sale take place?" "Were the drugs thrown or handed to the buyer?"

While it would have been better for the trial counsel, since it was a guilty plea case, to have had the matters he sought to bring out in a

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[267]17 M.J. 778 (A.F.C.M.R. 1983).
[268]*Id.* at 780.
[269]16 M.J. 899 (C.M.R. 1983).

stipulation pursuant to the pretrial agreement, he did not.[270] The trial counsel could have stayed within the scope of direct examination by asking:

"Why do you consider your offense serious?"

"What specific factors about your crime do you feel makes it more serious?"

"What do you consider more serious, the distribution of drugs or the possession of drugs?"

"Doesn't the fact that this sale took place on-post (in a barracks) make your sale of drugs especially serious?"

"Why do you regret having committed the offenses?"

"What is it about your offenses that you feel is particularly regretable?"

"Do you regret having involved another service member in drug use?"

"Is it regretable that you sold drugs to another soldier who might use those drugs and harm himself or other people?"

"Do you regret having flagrantly undermined the discipline of your unit by making the barracks a 'drug hangout'"?

"Why do you like the Army?"

"Are you dependable enough to stay in the Army and contribute to a unit?"

"Is your job performance good enough that the Army should overlook your drug possessions and keep you in the Army?"

In *United States v. Robiedeau*,[271] the accused made a sworn statement in mitigation that he had done well during his prior enlistment. The court held that questions by the military judge concerning intentions regarding future service and the reasons for committing the offense went beyond the scope of direct examination. Again, the questions could have been phrased to be within the scope. For example: "Does your prior service record support reenlistment?" "How did you consider your work during that period of time?" The accused may indicate that he had a good record during that period of time.

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[270]*See, e.g.*, United States v. Sharper, 17 M.J. 803 (A.C.M.R. (1984); United States v. Keith, ACM 23996 (A.F.C.M.R. 14 Mar. 84), *petition filed*, 18 M.J. 97 (C.M.A. 1984).
[271]16 M.J. 819 (N.C.M.R. 1983).

This information may be false, thus paving the way for the admissibility of an Article 15 or prior conviction previously ruled inadmissible. The accused could also be asked: "Do the circumstances surrounding the crime to which you pled guilty support your continued service?" That response will probably elicit additional, follow-up questions. Another guilty plea case is *United States v. Armstrong*,[272] in which the accused testified: "I like the Army and want to stay in it." The chain of command testified that the accused's duty performance was bad. This was held to be beyond the scope of the defense evidence. Again, some follow-up questions of the accused would be in order. For example: "When did you decide you liked the Army and does your present record support you remaining in the service?" The accused will probably answer yes. Then there could be a series of questions of "You've had no prior convictions?" "No arrests?" "No Article 15s?" "No counseling statements?" If any of those are untrue, there could be specific contradiction. Likewise, in *United States v. Wright*,[273] the accused made an unsworn statement: "I would like to get my life straightened out as soon as I can get all this bad stuff behind me." The court held that the trial counsel could not rebut this by introducing evidence that the accused tried to sell drugs between the time of apprehension and the time of trial and that he made a statement that he was always going to use marijuana. The follow-up questions by the trial counsel should be: "What is this bad stuff?" "When did you form the idea that you wanted to get your life straightened out?" "Has your conduct since being apprehended supported your idea of getting the bad stuff behind you?" Unless the accused is honest, what was excluded by the court would come in.

In addition to cross-examining character witnesses, the prosecution may also introduce reputation and opinion evidence in rebuttal to the defense evidence.[274]

The courts of military review have held that the prosecution may not rebut an unsworn statement of the accused by introducing evi-

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[272]12 M.J. 766 (A.C.M.R. 1981).

[273]A.C.M. 23922 (A.F.C.M.R. 30 Aug. 1983).

[274]United States v. Boughton, 16 M.J. 649, 649-50 (A.F.C.M.R. 1983). "A commander is responsible for the welfare and discipline of everyone under his command and may properly testify in rebuttal during the sentencing portion of the trial, as to his knowledge of the conduct and performance of his subordinate even when the knowledge is imparted to him by others."

dence as to the character of the accused for untruthfulness.[275] These holdings are based on paragraph 75*c*(2)(c) of the 1969 Manual, which states: "The accused may make an unsworn statement under this paragraph and may not be cross-examined by the trial counsel upon it or examined upon it by the court. The prosecution may, however, rebut any statement of fact therein."[276] There is no prohibition against introducing character evidence as to untruthfulness. The defense wants the sentencing authority to believe what the accused is saying. That being the case, the prosecution should be able to present evidence that the accused has a bad reputation for truth and veracity or certain witnesses know that the accused is known as a liar.

When there is an unsworn statement the accused cannot be cross-examined by the members or the military judge.[277] When the court members seek to question the accused, cautionary instructions should be given.[278] To make a distinction between sworn and unsworn testimony, the military judge has the discretion to have the accused make an unsworn statement from counsel table.[279] The preferable means would be to give an instruction as to unsworn statement by the accused.[280] If, during argument, defense counsel refers to this as "testimony," such a cautionary instruction may be given over objection.

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[275]MCM, 1969, para. 75(c)(2) (C5, 1 Apr. 1982). *See* United States v. Shewmake, 6 M.J. 710 (N.C.M.R. 1978); United States v. McCurry, 5 M.J. 502 (A.F.C.M.R. 1978); United States v. Stroud, 44 C.M.R. 480 (A.C.M.R. 1971).

[276]MCM, 1969, para. 75*c*(2). The 1981 amendment is substantially unchanged, MCM, 1969, para. 75*c*(1)(c) (5 April 1982). *Cf.* R.C.M. 1001(c)(2)(C).

[277]United States v. King, 12 C.M.A. 71, 30 C.M.R. 71 (1960); United States v. Clark, 50 C.M.R. 350 (A.C.M.R. 1975) (remanded as to sentence); United States v. Royster, 43 C.M.R. 468 (A.C.M.R. 1970) (error but not prejudicial).

[278]*See* United States v. Lewis, 7 M.J. 958 (A.F.C.M.R. 1979); United States v. Suttles, 6 M.J. 921 (A.F.C.M.R. 1979).

[279]United States v. Welch, 1 M.J. 1201 (A.F.C.M.R. 1976).

[280]*Id. See also* Carter v. Kentucky, 49 U.S.L.W. 4225 (U.S. March 9, 1981). Upon request, failure to instruct court members they may not draw any adverse inference from the fact the accused did not testify is a violation of the self-incrimination clause of the fifth amendment. Justice Stevens concurring said: "I remain convinced that the question whether such an instruction should be given in any specific case—like the question whether the defendant should testify on his own behalf—should be answered by the defendant and his lawyer not by the State." *Id.* at 4231.

X. CONCLUSION

The emphasis on general character evidence will fade based upon the recent decisions of the Court of Military Appeals. Some counsel have planted the issue for appellate purposes. Trial counsel will tend to make light of the fact that the accused could not present evidence as to specific character traits but had to rely upon evidence as to general character. This will be contrasted with the character trait in issue. In the future, the issues will center around sentencing matters, what constitutes personnel records, what constitutes matters in aggravation, and the relaxation of the rules for extenuation and mitigation. Each side will seek to present all it can to have meaningful sentencing. Trial judges, too, will promulgate rules simlar to those promulgated by Colonel Ronald B. Stewart.[281] These rules will seek to give more meaningful information to the sentencing authority.

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[281] Appendix C.

Witness Name & Address	Familial/ Social/ Employment Relationship	Time Known Accused	Opinion o Reputatio Evidence

PENDIX A

on or tation ence	Character Trait	Summary of Testimony

APPENDIX B

CASE PREPARATION CHECKLIST

UNITED STATES V. _____

1. Case file complete?

   a. Date charge(s) preferred _____
   b. Date charge(s) referred _____
   c. Date charge(s) and case file received _____
   d. Date confined/restricted _____
   e. IDC request _____
   f. Civilian counsel retained _____
   g. Defense counsel released _____
   h. CID/MP reports _____
   i. German police reports _____
   j. Laboratory reports _____
   k. Other _____

2. Initial client interview with attorney _____

3. Written statement from client _____

4. Autobiography from client _____

5. Examine 201 file _____

6. Medical and Dental records, if relevant _____

7. Interview witnesses
   a. Defense
   b. Character, Extenuation & Mitigation
   c. Prosecution
   d. Possible aggravation & rebuttal
   e. Chain of Command

      1. Company Commander
      2. 1SG
      3. Plt Ld
      4. Plt GT
      5. Sqd Ld
      6. Other

   f. Stateside witnesses; letters from
   g. Obtain addresses, phone numbers, DEROS, and current status (on leave etc) from all witnesses

8. Background and possible impeachment matters for prosecution witnesses

9. View scene of crime and prepare diagram

10. Submit discovery requests _____

11. Case research and preparation

a. Examine charges and specifications
b. Develop theory of case
c. Research law
d. Prepare exhibits
e. Prepare motions
f. Prepare evidentiary objections/arguments
g. Prepare jury instructions
h. Prepre voir dire questions
i. Prepare special findings
j. Other

12. Polygraph examination _____

13. For trial:

a. Check personal data _____
b. Submit trial-forum request _____
c. Stipulation of fact _____
d. Submit deal for guilty plea _____
e. Copies of convening orders _____
f. Ascertain background of court members _____
g. "Prep" accused and defense witness for court _____

14. Post Trial:

a. Appellate rights forms _____
b. Ascertain appellate issues _____
c. Request for deferment of confinement _____
d. Clemency petition _____
e. Other _____

15. Remarks/Comments:

APPENDIX C

SUPERVISORS PRE-SENTENCE REPORT

_____ who is presently pending trial before (Special) (General) Court-Martial is a member of my_____ and has served under my supervision since _____ 19____. His primary MOS is _____. His duty MOS is _____. Compared with other soldiers of his grade and experience:

1. His duty performance has been:
   ☐ above average ☐ average ☐ below average
2. Except for the present change(s) his off duty behavior has been:
   ☐ unknown ☐ acceptable ☐ unacceptable
3. His potential for further service is:
   ☐ above average ☐ below average ☐ average
4. I would like to serve with him again:
   ☐ today ☐ after rehabilitation ☐ never
5. If returned to duty he should serve in:
   ☐ his present unit ☐ another USAREUR unit ☐ CONUS
6. Compared to his prior conduct his conduct pending trial has been:
   ☐ better ☐ about the same ☐ worse ☐unknown (see remarks)
7. Concerning the facts of the offense(s), I have:
   ☐ personal knowledge ☐ read the charges ☐ little or no knowledge
8. Whether or not he is convicted, or what he is convicted of, affects my opinion:
   ☐ only slightly ☐ not at all ☐ very much (see remarks)
9. Compared to an unknown replacement I would prefer:
   ☐ to keep him ☐ anyone else in his grade ☐ a recruit from AIT

10. If no replacement in his MOS were available I would prefer:
☐ he remain ☐ to OJT anyone else ☐ a vacancy

Remarks: _____

_____

_____

_____

_____

_____

_____

_____
DATE

_____
Signature

NOTE: To be completed no more than 7 and no less than 3 days before trial begins.

_____
Grade and Branch

_____
Duty Position

_____
Total years of active duty

MILITARY DISABILITY IN A NUTSHELL

by Major Chuck R. Pardue*

This article examines the workings of the Army disability system, which is representative of all United States military disability systems. Because of abuses, eligibility for military disability is restricted by the administrative presumption of fitness rule. This rule is overbroad and particularly harsh to those soldiers who are not eligible for retirement. Military disability, Veterans' Administration, and Social Security benefits for disabled soldiers are generous, confusing, and complicated. To facilitate review and to obtain a de novo hearing in the federal courts, future plaintiffs in disability litigation may resort to the Privacy Act in increasing numbers.

I. INTRODUCTION

Disability cases arise from a variety of circumstances, limited only by the diverse maladies that can afflict man. Each year, several thousand service members are separated or retired from the military with physical disability.[1] Only after medical treatment has failed to return an individual to full duty do considerations of a possible disability discharge become apparent or appropriate. Many soldiers qualify for military, Veteran's Adminitration (VA) and Social Security Administration benefits. Over the years, Congress enacted various laws that provide generous and comprehensive benefits for

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[1]In fiscal year 1983, the Army separated or retired for disability approximately 4,000 active duty service members. U.S. Army Physical Disability Agency, Case Summary, FY 83 (1984) [hereinafter cited as USAPDA Case Summary].

veterans.[2] At times, these benefits have logically complemented each other and created a fair and generous system of disability compensation. Occasionally, however, the various systems established to provide benefits may prove confusing and arbitrary. Sometimes, individuals have received far more money from the disability systems than they earned when they worked. However, over the past ten years Congress took steps, mainly by reducing tax exemptions, to limit disability compensation.[3]

This article will examine the various disability systems that apply to service members. An emphasis will be placed on the Army disability system, as set forth in Army Regulation 635-40.[4] This article will also discuss the cornucopia of benefits that accrue to disabled veterans.

II. LEGISLATIVE HISTORY

Until the Civil War, there was no established military disability system in the United States. The leadership recognized that humanitarian and political considerations necessitated a fair statutory method by which to separate from the services those who, because of physical problems, were unfit to command troops or captain ships. Congress in 1861 enacted "An Act providing for the better Organization of the Military Establishment."[5] Sections of that act provide:

> . . . . That if any commissioned officer . . . shall have become . . . incapable of performing the duties of his office . . . shall be placed upon the retired list . . . with . . . the pay proper of the highest rank held by him. . . .
>
> . . . .

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[2]Military disability statutes may be found at 10 U.S.C. §§ 1201-1221, 1372-1373, 1401, 1403 (1982). The Veterans' Administration disability laws are at 38 U.S.C. §§ 301, 501-562 (1982), with applicable regulations at 38 C.F.R. pts. 3, 4 (1983). The applicable Social Security laws for veterans are found at 42 U.S.C. §§ 417, 420-423, 424a-426-1, 429-431 (1982).

[3]I.R.C. §§ 86 (1982) (making a portion of Social Security compensation taxable), 104(b) (making peacetime military disability income taxable for those who came on active duty after September 24, 1975).

[4]Dep't of Army, Reg. No. 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation (15 Feb. 1980) [hereinafter cited as AR 635-40]. The other services administer their systems in a similar fashion. *See* Dep't of Air Force, Reg. No. 35-4, Physical Evaluation for Retention, Retirement, and Separation (12 Sept. 1980) [hereinafter cited as AFR 35-4]; NAVSO P-1990, Disability Evaluation Manual (1983). For a discussion of the other services' systems, *see* Michalski, *The Air Force Disability System—An Overview*, 23 A.F.L. Rev. 218 (1982-83) (Air Force); Wellen, *Armed Forces Disability Benefits—A Lawyer's View*, 27 JAG J. 485 (1975).

[5]12 Stat. 287 (1863).

> [A]ssemble a board . . . to determine the facts as to the nature and occasion of the disability of such officers as appear disabled to perform such military service . . . no officer . . . shall be retired either partially or wholly from the service without a fair and full hearing before the board, if, upon due summons, he shall demand it.[6]

The recommendations of these early disability boards required the personal approval of President Lincoln.[7]

As was common with much of the legislation involving the military, Congress eventually enacted separate statutes for the Navy and Army.[8] The original laws, like the one above, provided only for officers. Later, the coverage expanded to cover enlisted members and reservists.[9] Eventually, that law was retroactively interpreted by the Comptroller General to award to enlisted members disability retired pay if they had continued to serve with their disability as warrants or commissioned officers.[10]

The present statutory scheme was established as part of the Career Compensation Act in 1949.[11] It applied to all branches of the service, covered both active duty and reserve component personnel, and introduced into law the concept of temporary disability and severance pay. As the legislative history indicates, the legislation was designed to correct prior abuses:

> For a great many years it has been the practice to retire an officer who is found physically incapable of military service, and pay him a compensation equal to 75 per cent of his base and longevity pay. No differentiation was made as to the actual degree of the disability, so long as it was sufficient to constitute an incapacity for active service. Nor did retirement practices extend to the enlisted grades, as a whole. The proposed legislation would relate the amount of compensation to the degree of disability, and which would establish an incapacity of 30 percent as the minimum which would qualify the member for retire-

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[6]*Id.* §§ 16, 17.

[7]*Id.*

[8]*See* Brown v. United States, 113 U.S. 568 (1885) (Navy case); United States v. Tyler, 105 U.S. 244 (1882) (Army case). At least one of the separate service laws has survived. *See* 10 U.S.C. § 6160 (1982).

[9]Act of Apr. 3, 1939, ch. 35, § 5, 53 Stat. 557.

[10]Comp. Gen. Dec. B-205111 (19 Feb. 1982).

[11]Pub. L. No. 81-351, §§ 401-415, 63 Stat. 816 (1949) (codified at 10 U.S.C. §§ 1201-1221, 1372-1373, 1401-1403 (1982)).

> ment. A lesser degree of incapacity is compensated by the granting of lump-sum "severence pay" instead of long-term retirement pay. Further, the principle for physical disability is extended to the enlistment grades on the same relative basis as is applied to the commissioned grades.[12]

The Department of Defense (DOD) implemented the disability portions of the Act by DOD Directive 1332.18. That directive gave broad direction to the separate military services to write regulations in accord with the congressional mandate.[13] Over the years, there have been only two significant changes to the military disability system instigated by congressional interest. These are the presumption of fitness rule[14] and the broadening of coverage for those injured in the line of duty who have less than eight years of active service.

III. THE EIGHT YEAR RULE

The military diability system will provide disability retirement for injuries or disease occurring on or off duty, if the member is on active duty orders for more than thirty days and has at least a 30 percent disability as defined by the VA.[15] Congress had originally intended to limit disability retirement benefits to career soldiers. Those individuals not injured as the proximate result of performing duty would not be covered unless they had performed eight years of active service. If a state of war or national emergency had existed, those individuals not injured "as the proximate result of performing active duty" could receive disability retirement if they had been injured in line of duty.[16] "In line of duty" for disability purposes requires that the disability not be due to the claimants own misconduct and that the claimant was not absent without leave.[17]

With the expiration in 1978 of the declaration of National Emergency, which had been in effect since the Truman Administration, disability retirement coverage for those soldiers with less than eight years active service not injured as a "proximate result of performing

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[12]S. Rep. No. 733, 81st Cong., 1st Sess. 2092 (1949).

[13]*See also* 10 U.S.C. § 1216(b) (1982).

[14]*See infra* text accompanying notes 118-26.

[15]10 U.S.C. § 1201 (1982).

[16]This is reflected in the version of 10 U.S.C. § 1201 that existed prior to 1978. *See* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 91; Act. of Sept. 2, 1958, 72 Stat. 1451; Act of Sept. 7, 1962, 76 Stat. 508.

[17]Dep't of Army, Reg. No. 600-33, Personnel-General-Line of Duty Investigations (15 June 1980).

duty" was eliminated. For several years, there was doubt whether Congress would rectify the problem and continue coverage. For a period of time, the Air Force opted to deny coverage; however, the Army decided to continue as before.[18] Ultimately, this awkward situation was resolved by statutory amendments[19] and a Presidential Executive Order.[20] To eliminate the need for a declaration of a war or a national emergency, the law now permits coverage if "the disability was incurred in line of duty after September 14, 1978."[21]

IV. HOW THE ARMY DISABILITY SYSTEM WORKS

The Army disability sytem is directed by Army Regulation 635-40.[22] Other relevant Army Regulations include Army Regulations 40-501[23] and 40-3.[24] With the Veterans' Schedule for Rating Disabilities (VASRD),[25] these regulations provide answers to most of the common questions associated with disability processing.

A. MEDICAL EVALUATION BOARDS

Although soldiers may be referred for disability processing by any commander or by Headquarters, Department of the Army (HQDA),[26] the most common means by which disability processing is begun is by the treating physician to refer a member's case to a Medical Evaluation Board (MEBD). The regulation states: "Commanders of MTFs [Major Treatment Facilities] who are treating patients in an assigned, attached, or outpatient status may start action to evaluate a member's physical ability to perform the duties of his office, grade, rank, or rating."[27]

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[18]Conversation of the author with James Boyle, Plans Office, U.S. Army Disability Review Agency (Feb. 1984).

[19]10 U.S.C. § 1201 was amended by Pub. L. No. 95-377, § 3(1), 92 Stat. 719 (1978); Pub. L. No. 96-343, § 10(c)(1), 94 Stat. 1129 (1980); Pub. L. No. 96-513, tit. I, § 117, 94 Stat. 2878 (1980).

[20]Exec. Ord. No. 12,239, 45 Fed. Reg. 62,967 (1980) ("Suspension of Certain Promotion and Disability Separation Limitations").

[21]10 U.S.C. § 1201(iv) (1982).

[22]*See supra* note 4.

[23]Dep't of Army, Reg. No. 40-501, Medical Services—Standards of Medical Fitness (Dec. 1960) [hereinafter cited as AR 40-501].

[24]Dep't of Army, Reg. No. 40-3, Medical Services—Medical, Dental, and Veterinary Care (15 Jan. 1982) [hereinafter cited as AR 40-3].

[25]38 C.F.R. pt. 4 (1983).

[26]AR 635-40, paras. 4-5, 4-7.

[27]*Id.* para. 4-6.

Disability processing normally begins when the physician determines that, despite medical intervention, the soldier's physical or mental condition is so severe to warrant possible retirement, separation, or discharge. For guidance, the physician relies on Chapter 3 of AR 40-501, which contains medical retention standards. If the soldier does not meet those standards, he is referred to MEBD, which consists of three physicians and reviews the soldier's medical records, including medical history, laboratory reports, and X-rays.[28] The constitution, procedures, and appointment of the MEBD are detailed in Chapter 7 of AR 40-3. The MEBD screens cases for possible referral to the Physical Evaluation Board (PEB). In most instances, the member does not appear before the medical board and has no right to do so. However, a dissatisfied member may rebut the findings of the board and request reconsideration. If the MEBD agrees with the member, changes may be incorporated in an addendum to the original board's findings.

Soldiers and physicians should insure that a complete and accurate description of all relevant physical and mental impairments are in the narrative summary of the MEBD. A common problem with many medical boards is that the physician writing the narrative summary is primarily concerned with describing medical problems in his or her medical specialty, while overlooking or minimizing other relevant medical problems that a member may have. For example, a member may have an acute orthopedic problem, such as a crushed ankle. In addition, the member may have serious vision problems, resulting from the same accident. Unless the member is referred to ophthalmology for an additional examination, there may be no m ention of it in the MEBD forwarded to the PEB. Consequently, unless the matter is called to the PEB's attention, the board will not give a recommended rating for an otherwise ratable condition.

The MEBD may not inform soldiers that they are "unfit" for service or they will be discharged for physical disability, or approximate the amount of disability percentage rating that they should receive. Those responsibilities are by regulation detailed to the PEB, to which a case is referred upon the concurrence of two physicians.[29]

1. Physical Evaluation Board Processing

For a soldier being processed through the military physical disability system, the crucial stage is the PEB. The Army currently has four PEBs. They are at Walter Reed Army Medical Center,

[28] *Id.* paras. 4-8, 4-9, 4-11, 4-12.
[29] *Id.* para. 4-12.

Washington, D.C.; Fort Gordon, Georgia; Fort Sam Houston, Texas; and the Presidio of San Francisco, San Francisco, California. The PEB at Walter Reed currently serves those cases originating from Europe, Africa, the Middle East Area, Virginia, Maryland, the District of Columbia, and the northeastern United States. The PEB at Fort Gordon services the southeastern United States, part of the Midwest, Panama, South America, and the Caribbean. Fort Sam Houston's PEB services the Midwest. The PEB at the Presidio processes cases from the West Coast, Alaska, Hawaii, the Far East, and the Pacific, including Korea.

The PEBs consider a soldier's case both informally and formally. The formal board is normally converned upon the request of the member being processed. The PEB not only makes findings and recommendations to higher authorities of "fit" or "unfit," it also recommends a percentage of disability, whether a soldier is to be discharged with no benefits, separated with severance pay, placed on the Temporary Disability Retired List, or permanently retired from the Army.[30] Because about 95 per cent of the decisions of the four PEBs are approved by the various appellate and review boards and the Secretary of the Army, the importance of these findings and recommendations becomes quite clear.[31]

2. PEB Procedures

Once a case reaches the PEB, the file will include not only all the medical records but also the personnel records of the soldier. The allied papers will also contain a line of duty determination and a statement of service. A line of duty "yes" determination is a prerequisite for military disability benefits.[32] Those soldiers who are absent without leave, have received a punitive discharge, are pending a possible punitive discharge, or may receive a discharge Under Other than Honorable Conditions are ineligible for disability processing.[33] The major recommendations and findings of the PEB include whether the soldier is fit or unfit for duty, whether the disability is permanent, and the percentage of disability.[34]

All cases are initially reviewed informally. The informal board consists of a field grade medical officer or a Department of the Army civilian (DAC) physician on duty with the United States Army

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[30] *Id.* paras. 4-18a, 4-20q.
[31] USAPDA Case Summary, *supra* note 1.
[32] 10 U.S.C. § 1201 (1982); AR 635-40, para. 4-18a(4)(d).
[33] AR 635-40, paras. 4-1 to 4-3.
[34] *Id.* para. 4-18.

Physical Disability Agency (USAPDA), a president who is a field grade line officer, and a field grade personnel line officer.[35]

After reviewing all relevant records, the PEB will annotate its findings and recommendations on DA Form 199.[36] The member, who does not appear at the informal hearing, is informed of the results of the informal board through the Physical Evaluation Board Liaison Officer (PEBLO) who is usually a Department of the Army civilian working in the Patient Administration Division at each of the major hospitals. The member has three working days to decide whether to accept the findings and recommendations of the PEB or to demand a formal hearing. The election is indicated on the DA Form 199, which is returned to the PEB.[37]

When members disagree with the findings and recommendations of the informal board, they are encouraged to indicate the reasons for their disagreement. This may be accomplished by writing a letter to the PEB or contacting the military counsel at the PEB. Frequently, the reasons for disagreement can be resolved without the necessity of a formal hearing. The member, or counsel for the member, may request reconsideration of the informal board's findings and recommendations.[38] If the disagreement cannot be resolved informally, then a formal hearing at the PEB is the next step. Congress is sensitive to the hearing rights of disabled service members. A specific statutory provision guarantees that members receive a fair hearing before being separated for disability: "No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it."[39] This language is similar to language contained in the original Civil War statute.[40] This hearing right is given to soldiers at the PEB stage of their disability processing. At this formal hearing, a member may call witnesses, present evidence and argue for a favorable result.

The rights of soldiers at the formal PEB hearing include the right to a legal counsel for advice and representation. In almost all cases, the member is represented by either civilian or military counsel or by counsel for a veterans' group, such as the Disabled American Veterans. Each of the four Army PEBs have a member of the Judge

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[35]*Id.* para. 3-10b.
[36]Dep't of Army, Form No. 199, Physical Evaluation Board Proceedings (Sept. 1978).
[37]AR 635-40, para. 4-19.
[38]*Id.* para. 4-19d(3).
[39]10 U.S.C. § 1214 (1982).
[40]12 Stat. 287 (1863).

Advocate General's Corps available and colocated with the PEB. Although the military disability system is non-adversarial, the primary advantage of these military attorneys is that they have ready access to all the relevant records of the soldier and the PEB members. They represent soldiers and present the soldier's case in the most favorable light. Representation by military counsel begins when a member elects to have his case considered by a formal board.[41] Because they understand the intracacies of the system by practicing daily before the PEB, military counsel at the PEB are well situated to determine what is relevant or case-determinative.

If soldiers feel uncomfortable with military counsel, they have the right to be represented by civilian counsel. This, of course, is at their own expense.[42] Unlike VA disability hearings, civilian attorneys are not limited to ten dollars attorneys' fees.[43] Some members opt instead to be represented by counselors (non-attorneys) from various veterans' groups.

The formal board normally consists of the same individuals who took part in the informal PEB with the addition of a recorder, a court reporter who makes a detailed but not verbatim record of the hearing, the member, and counsel.[44] Unlike most administrative hearings in the Army, the recorder has a passive role and does not question or cross-examine witnesses. If a reserve officer is pending disability processing, a reserve officer will sit on the PEB for that case.[45]

In addition:

> . . . The member may testify as a witness, under oath, in his own behalf, in which case he may be cross-examined as any other witness.
>
> . . . The member or his counsel may introduce witnesses, depositions, documents, or other evidence in his own behalf, and cross-examine witnesses who have been examined by the PEB.
>
> . . . The member or his counsel may make unsworn statements, orally or in writing or both, without being subject to cross-examination.

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[41]AR 635-40, para. 4-10d.

[42]*Id.* para. 4-20b(1).

[43]38 U.S.C. § 3404 (1983). The section further provides for a criminal sanction of up to a $500.00 fine or two years imprisonment for soliciting, charging, or attempting to collect attorneys' fees for representation of veterans in administrative claims before the VA.

[44]AR 635-40, para. 3-10b.

[45]*Id.* para. 4-20b.

> . . . The member may remain silent. His choice not to make a statement or answer questions is not to be considered adverse to his interests.
>
> . . . The member may decline making any statement touching on the origin or aggravation of any disease or injury he may have. He may not be questioned on the matter unless he, or his counsel, opens up such matters during his direct testimony before the PEB or such information is a matter of record in the MEBD or contained elsewhere in his medical records.[46]

The latter two provisions probably had as their origin the statutory provision against requiring a member "to sign a statement relating to the origin, occurrence, or aggravation of a disease or injury that he has. Any such statement against his interests, signed by a member, is invalid."[47]

A valuable right at the PEB is the right to review all records that the PEB considers. The entire case file is available at the PEB for the member and counsel to review.[48] As these records are lengthy, it behooves counsel and the member to review them for accuracy and completeness well before the hearing. Many cases are ultimately determined by medical or personnel records not originally in the PEB file. Most often, such documents include medical evaluations and treatment accomplished after the original MEBD has been forwarded to the PEB. Only by thoroughly reviewing these records may counsel be assured that the PEB has been presented with all the requisite facts. In those cases where missing records are determinative, a formal hearing can be avoided by requesting a reconsideration of the file including the new relevant information.

The formal hearings are usually brief, as most of the issues would have been resolved by the findings of the informal PEB. The recorder will make a part of the record all the medical and personnel records considered by the informal board. Counsel for the member usually presents additional medical and personnel documentation not previously considered by the board. Occasionally, affidavits or letters from appropriate supervisors attesting to their personal observance on a member's physical condition and performance of duty are also included. The member testifies in most formal boards at the PEB, thereby providing the board members an opportunity to

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[46] *Id.* paras. 4-20d(2) to (4).
[47] 10 U.S.C. § 1219 (1982).
[48] AR635-40, para. 4-20i.

observe a member's physical problems first hand. The member may explain matters that are not a part of the record and the PEB has an opportunity to ask questions. In this process, the PEB considers the member's credibility and demeanor.

The decision whether to have a formal board is made by the soldier being considered for disability processing. In most cases, a soldier has nothing to lose by requesting a formal board. However, if the evidence presented to the PEB at a formal board is damaging to a soldier's case, the PEB may recommend a lower percentage of disability or make other negative findings.[49] Thus, counsel may best advise a member in appropriate cases not to request a formal board.

Alternatively, the soldier is given the opportunity to have a formal board without personally appearing.[50] Usually this is requested for personal reasons such as the desire to avoid embarrassment. Some soldiers simply do not wish to display their injuries or sickness to others. However, there also tactical reasons to not appear personally before the PEB. If the informal PEB recommendations are for the most part favorable to the member and the member desires to contest only part of the informal findings without risking loss of what has already been gained, a formal board with nonpersonal appearance may achieve that goal. For example, were the PEB to recommend permanent retirement at 30 percent disability, the member would not in most cases wish to risk contesting that recommendation. However, the member might want the PEB to recommend a higher disability rating. If the disability rating for that condition ranges from 20 to 40 percent, then there is the real possibility that if the individual appears in person, the PEB, upon seeing the individual, may determine that the disability is only worth 20 percent. In that unhappy event, the individual not only has had the disability rating reduced, but would also lose the critically important recommendation of permanent retirement. By law, an individual may only receive permanent disability retirement if the disability rating is 30 percent or higher and the condition is permanent.[51]

To avoid this risk and at the ame time present evidence that may tend to increase the award, not appearing personally at the formal board may be the proper election for the member. Counsel, even in the absence of the member, may present evidence, usually signed statements or further medical proof, and argue for an increase in disability.

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[49]*Id.* para. 4-20q(2).
[50]*Id.* para. 4-20g.
[51]10 U.S.C. § 1201 (1982).

In addition to announcing the decisions in an open session of the formal PEB, the findings and recommendations are given to the member on a DA Form 199. These decisions, based on the facts presented to the PEB, are almost without exception fair to both the government and the member. In most cases, the PEBs actively search for means, consistent with law and regulations, to make recommendations favorable to members.

Although verbatim records are not required for the formal hearings, the transcripts are complete, including all relevant testimony and arguments of counsel. These transcripts become a part of the records of the case, and copies are furnished to counsel and members concerned.

After the member receives a copy of the transcript, he has three days to submit a rebuttal. Usually, the rebuttal consists of additional medical evidence that was not previously presented to the PEB. The PEB president will reply to the rebuttal and state that the rebuttal was considered, and, if not favorably received, the reasons therefor.[52] After the PEB completes processing, the case file is forwarded to the United States Army Physical Disability Agency (USAPDA).

V. ARMY ADMINSITRATIVE REVIEW OF FINDINGS AND RECOMMENDATIONS

Once the case is forwarded to the USAPDA, the first level of review is the Disability Review Council (DRC). The DRC will make certain that

(1) The person evaluated received a full and fair hearing.

(2) Proceedings of the medical board and the PEB were according to governing regulations.

(3) Findings and recommendations of the MEBD and the PEB were just, equitable, consistent with the facts, and in keeping with the provisions of law and regulations.

(4) Due consideration was given the facts and requests contained in any rebuttal to the PEB findings and recommendations submitted by, or for, the individual being evaluated.

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[52]AR 635-40, para. 402 r(3).

(5) Records of the case are accurate and complete.[53]

The DRC performs the function of eliminating the problem of inconsistent findings between the PEBs that had existed before 1949. Ratings and factual determinations among the various PEBs are today essentially consistent. The DRC review of all PEB findings and recommendations insures that procedural and factual problems are disposed of before final action. Approved cases are sent to MILPERCEN, which issues final discharge orders.

The DRC changes cases by issuing letters of modification to the PEB and the member. However, the DRC approves about 95 percent of the PEB findings and recommendations. The DRC will not revise PEB findings unless: "(1) the evidence in the record is so clear and compelling as to require revision. (2) Accepted medical principles prevent a reasonable possibility of the PEB findings and recommendations being correct."[54]

The USAPDA may direct that the PEB reconsider or further investigate any aspect of a case. Additionally, if it is in the best interests of the member or the government, a new formal hearing may be ordered. For example, if the USAPDA learns of possible fraud before the discharge of a member, a new hearing may be directed.[55] The USAPDA refers all cases involving general officers and medical corps officers to the Office of Secretary of Defense, Health Affairs, for review before final action.[56]

An additional appeal within the Army for those still on active duty is to the Army Physical Disability Appeals Board (APDAB). For the most part, this board considers cases referred to it by the Commanding General, USAPDA. This board may also consider rebuttals to USAPDA modifications. The decisions of this board, after considering rebutals, are final.[57]

After an individual retires for physical disability from the Army, he may apply to the Army Disability Rating Review Board (ADRRB). Appeals to the ADRRB usually contest the percentage of disability awarded by the Army or whether an individual should be on the Temporary Disability Retired List (TDRL) or on the Permanent Retired List.[58] This board has the power to modify a fully executed retirement order if

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[53]*Id.* para. 4-21.
[54]*Id.* para. 3-9c.
[55]*Id.* para. 4-22a(2).
[56]10 U.S.C. § 1216 (1982); AR 635-40, para. 4-22a(5).
[57]AR 635-40, paras. 4-22a(4), 4-22b, 4-22e, 4-25c, 4-25d, 4-25e.
[58]*See infra* text accompanying notes 81-87.

(1) The original order was based on fraud or mistake of law.

(2) The member was not granted a full and fair hearing when the member had made timely demand for such a hearing.

(3) Substantial new evidence exists which, by due diligence, could not have been presented before disposition and the evidence would have warranted assigning a higher percentage of disability if presented before disposition.[59]

The petition to the ADRRB must be made within five years of the "disposition complaint."[60]

Individuals, including those persons eligible to appeal to the ADRRB, may also apply after discharge or separation to the Army Board for the Correction of Military Records (ABCMR).[61] Ordinarily, members must apply to the ABCMR within three years of learning of the error or injustice.[62] Often, appeals are filed there before initiating action in the federal courts.

In summary, disability processing within the Army is thorough and complete. Cases are considered at three levels: initially, at the MEBD where medical impairments are detailed and potential disability cases are screened for possible referral to the PEB; at the PEB, where findings and recommendations as to disability discharges and percentages of disability are made. The PEB first reviews a service member's case informally and, if the soldier makes a request, the case is considered in a "full and fair" hearing at the formal PEB. At the third level, findings and recommendations of the PEBs are sent to the USAPDA where they are reviewed by the DRC and other appropriate review boards.

VI. RECOMMENDATIONS OF PEBs

The PEBs make several important findings and recommendations that may affect soldiers for their entire lives. These critical findings and recommendations deserve more than mere mention and are discussed in detail.

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[59]*Id.* para. 4-17.

[60]*Id.*

[61]10 U.S.C. § 1552 (1982).

[62]*See* Dep't of Army, Reg. No. 15-185, Boards, Commissions, and Committees—Army Board for Correction of Military Records (18 May 1977).

A. FIT OR UNFIT FOR DUTY

The first crucial recommendation made by the PEB is whether a member is fit or unfit for duty. In the entire disability process, this concept is the most crucial and confusing to potential disability retirees. It had in the past meant whether a member is physically fit to perform the duties of his office, grade, or rating. With the recent interim change to the regulation, the definition has been significantly altered and restricted. The new definition has added the words "in such a way as to reasonably fulfill the purpose of his employment on active duty Army-wide under field conditions. . . ."[63] The probable effect of this change is discussed below.

In order for a member to be discharged or retired from the Army for physical disability, there must be a determination that the soldier is physically unfit.[64] This is so even if the member has serious physical impairments ratable by the VA or has a physical condition listed as a physical fitness retention standard under Chapter 3 of AR 40-501.[65] A member may fail to meet the retention standards of AR 40-501 and have ratable disabilities of 100 percent disability from the VASRD,[66] and still be found fit for duty and not receive any disability from the military.

This unusual result comes about because of the definition of fitness and the presumption of fitness rule.[67] Basically, the rule may be stated as follows: if an individual, despite physical disability, continues to work up until the time he is processed for normal separation from the service, then that individual will be presumed to be fit and denied all military disability benefits. However, that individual would remain eligible to receive disability pay from the VA, which does not have a presumption of fitness rule.

Many of the hearings at the PEB focus on this issue. For example, a member may have serious medical problems yet return to duty as part of the normal rehabilitation process. Notwithstanding his disability, he may appear to be moderately successful and receive favorable evaluation reports. In the meantime, no one, including the treating physician, has explained the presumption of fitness rule to the member. As is often the case, this soldier may be totally unaware of any potential disability benefits.

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[63]AR 635-40, paras. 2-1, 4-11, 4-18a(1) (I03, 7 Sept. 1983).
[64]10 U.S.C. 1201 (1982).
[65]AR635-40, paras. 2-1a, 2-5.
[66]U.S.C. § 1201 (1982); 38 C.F.R. pt. 4 (1983).
[67]*See infra* text accompanying notes 118-26.

For many soldiers who return to duty after an injury or illness, there is a false perception that, when they separate or retire, the Army will take care of them by providing disability pay for the injuries and diseases they incurred on active duty. This perception is caused in part by the misunderstanding of the relationship of VA and military disability benefits. Additionally, physicians are properly more concerned with cure and treatment than with the possibility of disability pay for their patients. Many physicians do not take the time to fully comprehend the complexities of the disability system. Even if the physicians do understand the system, they often fail to advise their patients because they feel that it is not their role. Sometime later, usually when the soldier is being retired or separated, the issue of disability compensation is considered for the first time.

Let us assume that the individual in our example had been seriously injured in combat and, at the time of his injury, satisfied all the requirements for a disability retirement. However, in spite of great physical discomfort, he opted to return to duty. Further assume that, at a later point of his career, he was nonselected for promotion and the process of separating him from the service had begun. As part of the separation procedure, he receives a required separation physical. At this point, because of serious physical or mental impairment, he learns that he will be processed for possible disability retirement. However, when his case reaches the PEB, the PEB, applying the presumption of fitness rule, will in all probability find this soldier fit for duty and deny all military disability benefits. Under the facts of this example, the PEB is required by regulation to compel the member to show by "clear and convicing evidence" that the presumption of fitness has been overcome.[68] Given the many favorable ratings that prove that the member had been performing satisfactorily, the regulatory burden of proof makes it almost impossible for this soldier to obtain military disability. Although he is still eligible for VA benefits, he loses all military retirement benefits.

An interim change to AR 635-40[69] could radically affect the presumption of fitness rule. The additional requirement in the definition that the soldier be physically fit or able to perform duties "worldwide under field conditions," will make it somewhat easier for a soldier with long-standing physical impairments to convince a PEB that he was improperly retained in the Army, even with the "clear and convincing" standard of proof. If the individual has serious impairments that require medication and continuing in-

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[68]AR635-40, para. 2-2b(4).
[69]*See supra* note 63.

patient or out-patient hospital care, then even by a clear and convincing evidence standard he is not fit for duty under field conditions in a worldwide environment.

Another classification is also affected by the presumption of fitness rule. Under the old definition of fitness, young soldiers who eluded the screening process of the entrance physical could sometimes remain on active duty despite a failure to meet the entrance or retention standards of AR 40-501. Many of these cases involved congenital deformities or other physical conditions that existed prior to service, were not readily apparent, and did not interfere with their regularly assigned duties. Although they might be processed for disability separation, such members could argue that, despite the fact they might require some continuing medical treatment or that they could not take part in physical training because of their profile, they should be found fit for duty because they performed all the routine duties that the Army required of them. These individuals, however, presented problems for personnel managers because they could not be reassigned to hardship tours overseas due to their profile limitations. The interim change requiring soldiers to be physically fit for worldwide duty under field conditions makes it more difficult for these soldiers to successfully argue that they are fit.

B. ADDITIONAL FINDINGS

Once a member survives the initial hurdle by being found physically unfit, the PEB makes additional findings and recommendations. Under the law prior to the Career Compensation Act, once an officer was found unfit, he was retired at 75 percent disability regardless of the degree of impairment.[70] The PEB is required now to make findings concerning medical impairments existing prior to service (EPTS) and reduce the amount of disability for those impairments by an EPTS factor. If the EPTS impairment was the only one for which a member was being found unfit, then the member would be discharged but would not be entitled to disability from the Army. An example would be a cancer that takes more than four months to incubate. If the member shows signs of the cancer when in basic training and if, by accepted medical principles, it can be established that the disease originated before the soldier came on active duty, the the condition is EPTS. Assuming that the Army has done nothing to worsen the condition, the soldier will be discharged without military disability benefits.[71]

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[70]*See* S. Rep. No. 733, 81st Cong., 1st Sess. (1949).
[71]AR 635-40, paras. 2-3, 4-18e.

In those cases, the PEB must determine both when the injury or disease occurred and whether service aggravation had occurred. If the member proves that his impairment was made worse by active duty, then the member may be compensated for the amount of service aggravation. For example, a member may have had a bad knee from high school football, which was aggravated by unsuccessful surgery by the Army. The member would be entitled to a disability rating for service aggravation of his EPTS condition and would be entitled to the difference in disability rating between the EPTS and the aggravated condition.[72]

C. PERMANENT MILITARY RETIREMENT

For most members who are being required to leave active duty for physical disability, the most desired benefit of disability processing is permanent disability retirement from the service. Disability retirement does not necessarily depend upon the length of active service but may also depend upon the amount of physical disability, less EPTS, incurred or aggravated by active duty service. For example, a soldier with two years service who is severely injured, resulting in various impairments totaling 90 percent, could be permanently retired at 75 percent of his base pay. The maximum disability retired pay is the same as the maximum longevity retirement, 75 percent.[73]

Military disability compensation, unlike the VA disability compensation, is determined in whichever of two ways is to the advantage of the soldier. The first way is to multiply the base pay of the member by the percentage of disability. For example, a soldier with a 30 percent disability rating would retire at 30 percent of his base pay. The second method of computing retired pay applies to those members who have at least a 30 percent disability and is computed by multiplying the active years of service by 2½ to reach the retired pay. If a soldier has 16 years service and a 30 percent disability rating, he would be retired at 40 percent retirement, with 30 of that 40 percent being for disability.[74]

Under the military disability system, an individual of higher rank or years of service receivs a greater amount of military disability pay for the identical impairment. For example, a sergeant (E-5) with four years of active service and a lieutenant colonel (0-5) with sixteen years of active service, both of whom are injured in combat and both

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[72]*Id.* paras. 2-3c, 4-18e(3).
[73]10 U.S.C. § 1401 (1982).
[74]AR 635-40, app. C, para. C-10c.

of whom have all the toes of one of their feet amputated, would, in January 1984, have been entitled to 30 percent disability.[75] The sergeant would receive from the Army as retired pay $282.60 per month (30 percent times base pay of $942) for the rest of his life, with cost of living increases. The lieutenant colonel would receive $1,205.05 (2½ times 16 years of active service times a base pay of $3012.60 out of which $903.78 is military disability retired pay). Because the $301.26 of the O-5's pay is not for disability, that portion of the monthly check would be taxable.[76] Because different laws apply to cost of living increases to regular retirement than to disability retirement, the amount of increases could, over time, vary significantly. Congress, sympathetic to disabled veterans, has been prone to grant full cost of living increases.[77]

There are many benefits apart from compensation that render military disability permanent retirement highly desirable for those who have become disabled. Those benefits include all the normal benefits of having a retired military identification card[78] and, for their dependents, a dependent identification card.[79] With those identification cards, military retirees and their dependents may use the post exchange, commissary, other installation services available to retirees, and installation medical facilities.[80]

D. TEMPORARY DISABILITY RETIRED LIST (TDRL)

Often, the degree of permanent disability to a soldier is unknown during the period immediately following the injury. In addition, each person responds differently to treatment and some impairments worsen over time. Rather than permanently retire everyone at a set percentage determined at an early stage in the treatment process, Congress has directed that individuals with unstable physical or mental conditions and with at least a 30 percent initial disability be placed on the Temporary Disability Retired List (TDRL).[81]

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[75]38 C.F.R. §§ 4.71a, 5170 (1983).

[76]For a discussion of the tax consequences of disability pay, *see infra* text accompanying notes 158-61.

[77]38 U.S.C. §§ 314, 334 (1982).

[78]Dep't of Defense Form 2, Armed Forces Identification Card (Retired) (May 1979).

[79]Dep't of Defense Form 1173, Uniformed Services Identification and Privilege Card (March 1961).

[80]AR 635-40, app. C, para. C-8.

[81]10 U.S.C. § 1202 (1982).

Being on the TDRL offers both advantages and disadvantages. When on the TDRL, the member enjoys all the privileges and benefits of permanent retirement. By law, the maximum period a member can remain on the TDRL is five years. The statute also requires periodic medical examinations, at least every 18 months, after which a PEB reviews the member's case to determine if final disposition is appropriate.[82]

While on the TDRL, a member's condition may improve, remain the same or deteriorate. If the physical impairment improves as a result of treatment or the passage of time, and if the condition has stabilized, the member may then, if he meets the retention standards of AR 40-501, be found fit for duty. This determination ends military retirement and benefits. The member, if he so desires, may return to active duty.[83]

If the physical condition has stabilized and the member continues to have at least a 30 percent disability and the five-year limitation has not lapsed, the member will in most cases be permanently retired. When on the TDRL, the member receives a minimum of 50 percent of his retired pay.[84]

For a member whose condition has deteriorated and when the impairment remains unstable, the PEB will normally recommend that he be continued on the TDRL, if the five years has not run. The disability rating will continue to be the same as when he was first placed on the TDRL. However, when that person is finally removed from the TDRL, the PEB may recommend a higher disability percentage rating for permanent retirement.[85]

The member has no right to a formal hearing if the PEB continues him on the TDRL. However, if at an informal board, the PEB recommends any other disposition, such a permanent retirement, fit for duty, or discharge with severance pay, then the member has a right to a formal hearing.[86]

After a time on the TDRL, many soldiers are discharged with disability severance pay. This occurrence is most frequent with members whose condition has improved to the point that their impairment is ratable at less than 30 percent and they have less than 20 years of active service.[87]

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[82] *Id.* § 1210.
[83] AR 635-40, para. 7-11a(3).
[84] 10 U.S.C. § 1401 (1982); AR 635-40, app. C, para. C-9.
[85] AR 635-40, para. 7-20b.
[86] 10 U.S.C. § 1214 (1982).
[87] *Id.* § 1210(d).

E. SEVERANCE PAY

Those who are found unfit by the PEB and are not permanently retired or placed on the TDRL because their disability rating is less than 30 percent will normally be separated from the service with disability severance pay.[88] Disability severance pay is computed by multiplying twice a soldier's monthly base pay by each year of active service, up to a maximum of 12 years.[89] A major (0-4) with 16 years of active years for both pay and retirement would, in January 1984, have been entitled to a lump sum payment of $66,333.60 (monthly base pay of $2,763.90 multiplied by double the base pay for 12 years of service). As can be seen, disability severance pay can be significantly greater than other types of military severance pay. There is no statutory limit on disability severance pay other than the 12 year limitation. Additionally, disability severance pay, unlike other severance pay, is available to enlisted personnel. A sergeant first class (E-7) with 12 years of active service for pay and retirement would receive in January 1984 a lump sum payment of $33,076.80 (monthly base pay of $1,378.20 multiplied by double the base pay for 12 years of service).

F. DISABILITY FOR RESERVISTS

Certain classifications of reservists are also entitled to military disability benefits. Reservists are covered if they were *injured* as a proximate cause of performing

> (1) Active Duty (AD) or active duty for training (ADT) under a call or order that specifies a period of 30 days or less, to include full time training duty (FTTD) under Title 32 U.S.C. (502f, 503, 504, 505).
>
> (2) Inactive duty training (IDT) [weekend drills] (But not while en route to or from IDT).
>
> (3) ADT under authority of section 270(b) of title 10 United States Code. This authority permits ordering a member to active duty for training for 45 days or less to satisfy Ready Reserve training requirements.[90]

If the disability incurred is as a result of a disease, the reservist will normally not be entitled to military disability. However, if the dis-

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[88] *Id.* § 1203.
[89] AR 635-40, app. C, para. C-10b.
[90] *Id.* para. 8-2a.

ease is a complication of an injury, then the reservist may be covered, but it must be shown that the disease resulted from an injury.[91] Assuming that a reservist satisfies these requirements, he is eligible for disability processing and consideration by the PEB.[92]

VII. MILITARY DISABILITY RATINGS

A common question asked by soldiers concerns the amount of disability compensation that they will receive. This section will discuss some of the more important principles in ascertaining disability pay.

Instead of creating a new disability rating scheme for the military, Congress directed the military to use the VA standard schedule of rating disabilities,[93] the Veterans' Administration Schedule for Rating Disabilities (VASRD).[94] The VASRD lists disability percentages for various physical and mental impairments, ranging from 0 to 100 percent, depending upon the nature and severity of the impairment. The PEB, using the VASRD, determines the disability rating for a particular impairment. Once the percentage of disability recommended is known,[95] a member may calculate his military disability by multiplying that rate by his monthly base pay.[96] However, for those members entering active duty after September 7, 1980, the monthly base pay is averaged over any 36 months of active duty.[97]

If the rate is less than 30 percent, the member will receive a one time, lump-sum severance pay. The VA, which has an independent disability system, pays a flat monthly rate, regardless of base pay, rank, or years of service.[98]

Although, the military bases the disability ratings on the VASRD, it does not accept all VA policies for determining ratings.[99] Frequently, particularly in TDRL hearings before the PEB, evidence is presented that the VA, which also uses the VASRD, has given a higher rating for the same physical impairment. Although the PEB must consider that evidence, it is not bound by any determination of the VA.[100]

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[91] *Id.* para. 8-2b.
[92] 10 U.S.C. §§ 1204-1206 (1982).
[93] *See* 10 U.S.C. §§ 1201, 1203, 1204, 1206 (1982).
[94] 38 C.F.R. pr. 4 (1983).
[95] The recommended percentage is indicated on Dep't of Army, Form No. 199, Physical Evaluation Board Proceedings (Sept. 1978).
[96] 10 U.S.C. § 1401 (1982).
[97] *Id.* § 1407.
[98] 38 U.S.C. § 314 (1982).
[99] The Army modified the first 31 paragraphs of the VASRD in AR 635-40, app. B.
[100] Johnson v. United States, 138 Ct. Cl. 81 (1957), *cert. denied*, 355 U.S. 850 (1958).

In determining disability ratings, both the VA and the military apply the "whole man" concept. This means that, if an individual has several impairments, each injury must be considered separately. For example, a soldier, whose foot has been amputated, is determined, upon evaluation to also suffer from moderate diabetes, hypertension, and hearing loss. The amputation is ratable at 40 percent,[101] the diabetes at 20 percent (although if serious, it could be rated as high as 100 percent),[102] and the hearing loss at 10 percent.[103] It would appear that this equates to 70 percent. However, under the "whole man" concept, the individual would have a total disability rating of 56.8 percent, which is rounded to the nearest ten percent, and in this case is 60 percent. This is computed as follows:

1. Lower leg amputation equals 40 percent (leaving 60 percent of the "whole man" remaining).
2. Diabetes equals 20 percent (times the remaining 60 percent equals 12 percent).
3. Hearing loss equals 10 percent (times the remaining 48 percent equals 4.8 percent).

These subtotals are then added and rounded to the nearest 10 percent.[104]

The pyramiding rule and the amputation rule are other rules to prevent excessive ratings. The pyramiding rule prevents duplication of ratings for the same impairment. Some injuries can be rated in more than one way. The prohibition against pyramiding prevents combining these ratings to increase disability pay. Additionally, pyramiding prevents using manifestations of an EPTS condition to increase an overall rating.[105] The amputation rule works in a similar fashion by providing that the total rating for an injured limb cannot exceed the rating for the amputation of the portion of the limb affected.[106]

A major provision used by the VA to increase compensation that does not apply to the military is the bilateral factor. The bilateral factor adds 10 percent to the total rating when two of the same

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[101]38 C.F.R. §§ 4.71a, 5166 (1983).
[102]*Id.* §§ 4.120, 7913.
[103]*Id.* §§ 4.87a, 6295.
[104]To facilitate the computation, the VA uses the combined ratings table contained in *id.* at § 4.25. *See also* AR 635-40, app. B, para. B-12.
[105]38 C.F.R. § 4.14 (1983); AR 635-40, app. B, para. B-5.
[106]38 C.F.R. § 4.68 (1983); AR 635-40, app. B, para. B-18.

organs or extremities are impaired, *i.e.*, both hands, both ears, or both feet.[107] By declining to apply this rule, the military has fourther limited disability compensation.

VIII. PRESUMPTION OF FITNESS RULE

For many years, the statutory changes to the 1949 military disability system proved effective and noncontroversial. However, over a period of time, abuses of the system became apparent. It was noted that, by the early 1970s, a higher percentage of general officers and medical officers were being retired with a disability than members of the general military population. A study commissioned by the Department of Defense, entitled Disability Retirement Trends (DRT),[108] demonstrate that, in 1972, 52.6 percent of all general or flag officers were being retired with a disability. This was in stark contrast to the 18 percent of all DOD officers being retired with a disability. That same study illustrated that 38 percent of all retiring medical officers in DOD retired with disability in 1972.[109]

A significant part of this discrepancy in disability retirement rates may be that general and flag officers and medical officers frequently retire at an older age than most other officers, general and flag officers, for example, usually retire from active duty after approximately 30 years of active service. Medical officers usually start active duty later than the average officer because of their extensive civilian training. As this population ages, it would be reasonable to assume that physical disabilities will increase. These factors, however, failed to explain the abnormal disability rates for Medical Service Corps personnel and nurses. The DRT study hypothesized that the high rate of disability for officers in the medical field may have been due to the exposure of those personnel to greater health risks, their increased age, or because they have a greater understanding of the disability system.[110]

At this point, an understanding of the possible motivation to obtain military disability retirement is relevant. The chief motivation is financial. Military retired disability pay can be up to a maximum of

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[107]38 C.F.R. § 4.26 (1983); AR 635-40, app. B, para. B-13.

[108]R. Bothwick & A. Heindl, Disability Retirement Trends in the Uniformed Services 1972-1979 ii, 13 (figure 2.5) (Paper prepared for the Health Studies Task Force, Office of the Assistant Secretary of Defense (Health Affairs) (hereinafter cited as Disability Retirement Trends).

[109]*Id.* at 21 (figure 3.2).

[110]*Id.* at 19, 21.

75 percent of a service member's base pay.[111] On the other hand, the VA pays a statutory rate, ranging, in 1984, from $63.00 to $1213.00 per month, regardless of active duty rank, for disability, based on degree of impairment.[112]

All service members must elect to take their military disability compensation from either the VA or the military.[113] The importance of the election for officers and senior enlisted service members is in the difference in the amount of disability pay. Officers and senior noncommissioned officers receive a greater disability pension from the military than from the VA because the statutory VA amounts of disability pay are substantially less than military disability pay.[114] For example, in January 1984, a sergeant first class (E-7) with over 14 years of service for pay and retirement purposes, with a 50 percent disability, would have received monthly either $352.00 from the VA or $720.30 from the Army. Additionally, there are tax considerations. Normal longevity retired pay is subject to federal income taxes. Veterans' Administration disability compensation has always been exempt from federal income tax.[115]

The advantage to a soldier of receiving military disability retirement will become more apparent in the following example. Under the law, an individual could receive up to 75 percent as a disability retirement based on the degree of impairment. An officer, who would normally receive 50 percent of base pay upon retirement with 20 years of active service, would, if he had the requisite disability, retire at 75 percent, tax-free. For a 47-year-old lieutenant colonel (O-5), who is in the 40 percent tax bracket, with a life expectancy to age 72, the difference in retired, after-tax retirement income would be approximately $443,100.00. The $443,110.00 is computed in the following manner: Nondisability retired pay for a O-5 with 20 years of service is $1,641.00 per month, less taxes in the 40 percent bracket, leaving $984.00. Tax-free maximum disability retired pay is 75 percent of base pay or $2,461 per month. The difference between disability and nondisability retired pay is thus $1,477.00 per month, $17,724.00 per year, and $443,100.00 lifetime. The temptation to abuse the system would seem enormous.

The situation came to a head in October 1972, when the *New York Times* disclosed that General John D. Lavelle, USAF, retired at a 70

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[111] 10 U.S.C. § 1401 (1982).
[112] 38 U.S.C. § 314 (1982).
[113] 38 C.F.R. § 3.701 (1983).
[114] 38 U.S.C. § 314 (1982).
[115] *See infra* text accompanying notes 158-61.

percent disability and shortly thereafter passed a Federal Aviation Administration flight physical.[116] Congressional interest was piqued and hearings were held concerning military disability retired pay. Those hearings revealed that the problem of disproportionate numbers of general officers being retired for disability was both widespread and longstanding.[117]

Apparently, to avoid unwanted congressional intervention, DOD took steps to resolve the problem by implementing what is now known as the "presumption of fitness rule" in a DOD memorandum authored by Deputy Secretary of Defense Kenneth Rush on January 29, 1973.[118] The Rush Memorandum provided guidelines that over the years have proven effective, yet frequently harsh. The key provision is:

> When a member is being processed for separation for reasons other than physical disability, his continued performance of duty until he is scheduled for separation for other purposes creates *a presumption that the member is fit for duty*. . . .

The Rush Memorandum allowed for two ways to overcome this presumption:

> a. The member, in fact, was physically unable to adequately perform the duties of his office, rank, grade, or rating even though he was *improperly retained* in that office, rank, grade, or rating for a period of time.
>
> b. Acute, grave illness or injury or other deterioration of physical condition that occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability, rendered him unfit for further duty.
>
> When the member's referral for physical evaluation is related to physical examinations given as a part of nondisability retirement processing, evidence must be *clear and convincing* to overcome the presumption of fitness. In other cases, the presumption of fitness may be overcome by a *preponderance of the evidence*.[120]

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[116]N.Y. Times, Oct. 11, 1972, at 12, col. 4; *id.* at Oct. 25, 1972, at 16, col. 7.

[117]*Hearings Before the House Armed Services Comm.*, 92d Cong., 2d Sess. 17660 (1972).

[118]Memorandum for the Secretaries of the Military Departments, subject: Physical Disability Separations, Guidelines for Physical Disability Separation (Jan. 29, 1973).

[119]*Id.* (emphasis added).

[120]*Id.* (emphasis added).

The provisions of the Rush Memorandum were implemented in service regulations.[121] The effectiveness of the Rush Memorandum was borne out by a study that demonstrated that disability retirements for general and flag officers has decreased from 52.6 percent in 1972 to 3.1 percent in 1979.[122] Additionally, disability retirement rates for medical officers, excluding dentists, nurses, and Medical Service Corps officers, dropped from 38 percent in 1972 to about 9 percent in 1979.[123] These figures were essentially matched in an Air Force study conducted several years later.

Although the congressional intent was to correct abuses by general and flag and medical officers, the additional effect has been to curtail disability benefits for thousands of officers and enlisted personnel who might otherwise have bee awarded military disability benefits. Since 1972, disability retirements for those other than general and flag and medical officers were reduced by approximately 50 percent.[125]

Because of the presumption of fitness rule, any soldier approaching an estimated time of separation, forced separation or retirement is presumed to be fit for duty and ineligible for military disability retirement, notwithstanding disabling conditions that would otherwise qualify an individual for military disability retirement or disability severance pay. Of course, the VA will still compensate individuals for injuries or illnesses that have been determined by the VA to be incident to service. However, the VA compensation is often less than that provided by the military. Additionally, because of the presumption of fitness rule, many thousands of service members who are not eligible for longevity retirement have lost all other military benefits, such as commissary or post exchange privileges, that they would otherwise have been entitled to with at least a 30 percent military disability retirement.[126]

To insure that the Lavelle situation would not recur, Congress enacted the following measure:

> The Secretary concerned may not, with respect to any member who is in pay grade 0-7 or higher or is a Medical

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[121]AR 635-40, ch. 2.
[122]Disability Retirement Trends, *supra* note 108, at ii.
[123]*Id.* at 21.
[124]*See* Michalski, *supra* note 4, at 220.
[125]Disability Retirement Trends, *supra* note 108, at 6, 8, 21.
[126]*See* 10 U.S.C. § 1201 (1982) (secretary may "retire" service member with a 30 percent disability).

> Corps officer or medical officer of the Air Force being processed for retirement under any provision of this title by reason of age or length of service—
>
> (1) retire such member under section 1201 of this title;
>
> (2) place such member on the temporary disability retired list pursuant to section 1202 of this title; or
>
> (3) separate such member from an armed force pursuant to section 1203 of this title by reason of unfitness . . . unless the determination of the Secretary concerned with respect to unfitness is first *approved by the Secretary of Defense on the recommendation of the Assistant Secretary of Defense for Health and Environment.*[127]

A. CONTINUATION ON ACTIVE DUTY

One solution to the harsh effects of the presumption of fitness rule was promulgated in Chapter 6 of AR 635-40. The regulation provides that a member, who may be found unfit, may apply to be continued on active duty despite his disability. However, the member must be able to function normally, without undue loss of time from duty, in his military duties without medical risk to himself or others and be able to perform useful military service.[128] A member would be processed through the Army Physical Disability Evaluation System and, if his disability remained the same or increased, then in all likelihood he would receive an appropriate disability discharge or disability retirement when he separated from the service. However, as the PEB may find the member fit if the condition improves, the member takes the risk of losing disability benefits upon final separation. The perceived advantage of continuance on active duty (COAD) for the member is to avoid the presumption of fitness rule. The hoped for advantage to the Army was to identify those members suffering from impairments by encouraging them to be processed for possible medical separation or retirement and by giving those members who could provide valuable services to the Army a reasonable opportunity to stay on active duty. Unfortuntely, COAD has not worked in this fashion. Only a small percentage of COAD requests have been approved as can be seen by the following statistics taken from USAPDA briefing mterials.

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[127]Pub. L. No. 94-225, § 2(a), 90 Stat. 202 (1976) (emphasis added).
[128]AR 635-40, paras. 2-9, 6-5.

Fiscal Year	*COAD Cases*	*Number Approved*
FY 80	189	22
FY 81	313	14
FY 82	359	10
FY 83	548	15[129]

Because of the low approval rate, those members with many years of active service, but who are not retirement eligible and have marginal disabilities, may be best advised to avoid the military disability system altogether. Their hope would be to remain on active duty until they qualify for normal longevity retirement.

B. MODIFICATION OF THE PRESUMPTION OF FITNESS RULE

The presumption of fitness rule has recently been modified by the Army. In an interim change to AR 635-40, the words, "giving due consideration to his availability for worldwide deployment under field conditions," were added to modify the definition of "fit."[130] The reason give for the changes was "to prevent possible adverse judicial rulings against the Army."[131]

The effect of the above change will be twofold. First, it will be difficult to retain on active duty those soldiers who do not meet the retention standards of Chapter 3 of AR 40-501. This would affect those individuals who are able to perform their duties with a medical profile but cannot serve under field conditions because of their disability. For example, a soldier with extremely high blood pressure who needs constant medication and to be close to a medical facility would not be permitted to stay on active duty under a strict interpretation of the changes. Under the old rule, if the member could physically perform his duties, he could sometimes successfully argue that his disability did not interfere with his duties and remain on active duty.

The second major effect of the change will be to relax some of the problems associated with the presumption of fitness rule. If a soldier, because of a profile, cannot be reassigned to a remote field location, then it will be less of a burden for that individual to prove that he was improperly retained in the service, and may more easily

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[129]USAPDA Case Summary, *supra* note 1.
[130]AR 635-40 (I03, 7 Sept. 1983).
[131]*Id.*

qualify for disability retirement or separation. Additionally, this change will provide an opportunity to separate from the service those individuals who do not meet the physical requirements of their jobs.

As the presumption of fitness rule has proven overbroad in achieving its objective of curtailing abuses by senior officers, eliminating it now may be a sensible and equitable solution to the problem of arbitrarily denying military disability benefits to those who were not properly advised of their options when they sustained their injuries or illness. The rule is especially inequitable when the brunt of the rule's harsh effect falls on junior officers and enlisted members. Deserving sernior officers are also hurt by the rule because they must go to extraordinary lengths to receive the military disability compensation that Congress intended for them in the Career Compensation Act of 1949.[132] The presumption of fitness rule is not mandated by statute and can easily be rescinded by the Department of Defense. The statutory requirement that all disability retirement cases of general and medical officers be reviewed by the Assistant Secretary of Defense, Health Affairs[133] is sufficient to prevent future abuses by those groups.

An alternative to eliminating the rule would be to apply it solely to thoe individuals who are eligible for retirement. This would prevent individuals who otherwise qualified for disability retirement or separation from losing all statutory benefits because of the presumption of fitness rule.

IX. VETERANS' ADMINISTRATION DISABILITY BENEFITS

The VA administers a disability compensation system independent of the military. Although the VA requires certain military medical and personnel records to establish eligibility and the military is required by statute to use the VASRD to determine proper disaiblity ratings, for the most part the two disability systems function independently.

To avoid the problem of members failing to take advantage of VA benefits, Congress directed:

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[132]10 U.S.C. §§ 1201-1221 (1982).
[133]*Id.* § 1216(d).

> (a) A member of an armed force may not be discharged or released from active duty because of physical disability until he—
>
> (1) has made a claim for compensation, pension, or hospitalization, to be filed with the Veterans' Administration, or has refused to make such a claim; or
>
> (2) has signed a statement that his right to make such a claim has been explained to him, or has refused to sign such a statement. . . .[134]

The Physical Evaluation Board Liaison Officer usually accomplishes this statutory mandate as part of the overall disability processing.[135] This is accomplished by referring the member to a VA representative to begin processing. Until the VA reaches its own determination, the VA will sometimes begin compensating members after their discharge or retirement from service at the rating determined by the PEB.

The VA monthly compensation for disability as of January 1, 1984 was:

10 percent	$ 62
20 percent	$ 114
30 percent	$ 173
40 percent	$ 249
50 percent	$ 352
60 percent	$ 443
70 percent	$ 559
80 percent	$ 648
90 percent	$ 722
Total or 100 percent	$1213[136]

The VA provides additional compensation for severe impairments and total compensation for impairments can amount of $3461.00 per month.[136] Additionally, if the member has at least a 30 percent disability, the VA provides supplemental compensation for dependents. A member with a spouse and no children in 1984 would have been entitled to $74.00 in additional compensation. With a spouse and one child, the member would have received an additional $124.00 each

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[134] *Id.* § 1218.

[135] AR 635-40, app. C, para. C-4b(5)(b).

[136] 38 U.S.C. § 314 (1982).

[137] Fact Sheet, Federal Benefits for Veterans and Dependents (Jan. 1, 1984). This pamphlet describes in detail some little-known veterans' benefits provisions.

month. For each additional child, the veteran could have received $40.00.[138] If they are unemployable, veterans who have at least one disability rating of 60 percent or two ratings of which one is at least 40 percent and the two totaling 70 percent, may qualify for a total disability rating of 100 percent.[139] In addition to a dramatic increase in disability pay, these veterans also qualify for special educational programs for their spouses and children that are only available to totally disabled veterans.

An extremely valuable benefit is the Vocational Rehabilitation Program. In addition to disability compensation, a veteran enrolled in a qualified program in 1984 with two dependents may also receive $411.00 per month for a maximum of 48 months.[140] Another popular benefit for disabled veterans with college age dependents is the Survivors' and Dependents' Educational Assistance program. The spouses and children of veterans who are totally disabled, including those who have the 100 percent rating because of unemployability, are entitled to a maximum of 45 months of educational benefits. Children of disabled veterans may receive monthly checks until the age of 23 for college costs.[141]

One confusing rule is that, if a veteran is entitled to compensation from both the military and the VA, he may not collect an amount greater than the larger of the two pensions.[142] This does not mean that he must elect between pensions. The veteran is entitled to take part of his compensation from each, provided that the total does not exceed the larger of the two pensions. As the VA disability compensation is tax free,[143] there are tax advantages to electing to take the VA compensation. A veteran who is entitled to both pensions may elect to have his total compensation paid by the VA.[144] The effect will be to receive the VA portion tax free, with the remainder taxable if it does not otherwise qualify as tax free income.

Members who are discharged from the military with disability severance pay must pay back the amount of the disability severance pay before receiving a VA pension. Most veterans in this situation immediately apply for VA benefits and do not receive any VA com-

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[138]AR 635-40 (101, 7 Sept. 1983).
[139]38 C.F.R. § 4.16 (1983).
[140]38 U.S.C. § 1701 (1982).
[141]38 U.S.C. § 3104(a) (1982); 38 C.F.R. §§ 3.700, 3.750 (1983); AR 635-40, app. C, para. C-11a.
[142]I.R.C. § 104 (1954).
[143]38 U.S.C. § 521(i) (1982); 38 C.F.R. § 3.700(a)(4) (1983).
[144]38 U.S.C. § 1501 (1982).

pensation until an amount equal to the disability severance pay has been exceeded. For example, if a veteran has received $6,200.00 from the Army as a lump sum disability severance pay, it would be 100 months before the veteran would start to receive a VA disability pension. There are also limitations on receiving back benefits. Consequently, it is almost always to a veteran's advantage to apply for disability compensation benefits as soon as possible.[145]

X. CIVIL SERVICE BENEFITS

Other benefits that accrue to disabled veterans include employment advantages with the federal government. Disabled veterans are entitled to a 10-point veterans' preference on civil service examinations[146] and, if their disability was a direct result of combat, they are also exempt from the dual compensation provisions of civil service law.[147]

The 10-point veterans' preference is also available to the spouse of a disabled veteran if the disabled veteran cannot perform in a job "along the general lines of his or her usual occupation."[148] Additionally, under certain circumstances, the mother of a totally disabled veteran may qualify for a ten point veterans' preference.[149] The Federal Personnel Manual (FPM) defines a disabled veteran as follows:

> "Disabled veteran" means a person who was separated under honorable conditions from active duty in the armed forces performed at any time and who has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Veterans' Administration or a military department.[150]

Those veterans who a 30 percent or greater disability receive additional civil service seniority consideration over those disabled veterans with less than a thirty percent disability.[151]

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[145]Generally, the VA will pay back claims for disability for up to one year. 38 C.F.R. § 3400 (1983). Consequently, a veteran would be advised to file a claim as soon as possible with the VA to avoid losing potential disability compensation.

[146]5 U.S.C. § 2108 (1982).

[147]*Id.* § 5532(d)(1).

[148]5 U.S.C. § 2108 (1982).

[149]Federal Personnel Manual, ch. 211, para. 2-2 (May 7, 1981) (hereinafter cited as FPM).

[150]*Id.* at ch. 211, para. 2-1(6).

[151]*Id.* at ch. 211.

XI. SOCIAL SECURITY DISABILITY BENEFITS

Disability compensation may also be sought from an often-overlooked source, the Social Security Administration. These benefits are paid in addition to military or VA disability benefits.[152] For a single person, these benefits averaged in 1983 $442.00 per month; for a disabled worker with a family, social security benefits average $851.00 per month.[153] There are three qualifications to receive Social Security Disability payments:

> Disability is defined in Title II of the Act. . . . One, the claimant must suffer from a medically determinable physical or mental impairment. Two, the impairment must have lasted or be shown to last at least for twelve months, or result in death. The impairment must prevent the claimant from engaging in any substantial gainful employment for the same period . . . The claimant has the burden, in the first instance, of establishing his disability status . . . and that his disability arose while he was insured by the Act, 42 U.S.C. Sec. 416(i)(3)(B) and 423(c)(1)(B).[154]

Two recent changes affecting veterans must be noted. The first involves a total limitation on benefits paid by the federal government for disability. The Social Security Administration describes this limitation as follows:

> If you are a disabled worker under 65, Social Security checks for you and your family may be affected if you are also eligible for . . . certain Federal, State, or local government programs. Some examples of these are State, Civil Service, or *military disability* benefits. Total combined payments to you and your family from Social Security and any of the other programs mentioned above generally cannot exceed *80 percent* of your average current earnings before becoming disabled.[155]

The Army interpretation of this provision is contained in AR 635-40: "Every member should file a claim if any possibility of collecting exists since social security may be payable in addition to, and

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[152]42 U.S.C. § 417 (1982); AR 635-40, app. C, para. C-12.

[153]U.S. Dep't of Health and Human Serv., Social Security Admin., If You Become Disabled 18 (Apr. 1983) [hereinafter cited as If You Become Disabled].

[154]Pryor v. Schweiker, 568 F. Supp. 65, 72-73 (W.D. Mo. 1983).

[155]If You Become Disabled, *supra* note 153, at 22 (emphasis added).

without reduction from, Army or VA disability compensation."[156] This ambiguity between agency interpretation has been resolved by Congress by statutory language that provides that "prior to the month in which an individual attains the age of 65. . .," all government compensation is included except veterans benefits.[157] This would indicate that military disability pay is included in determining the 80 percent limitation and VA disability compensation is not included. This would be another reason for service members to apply and elect to take as much of their disability compensation from the VA as possible.

Severely disabled soldiers and veterans may also be entitled to compensation from the Social Security Adminitration. However, there are limitations on the total amount of military disability retired pay and Social Security disability compensation. Those limitations do not apply to VA compensation.

XII. TAX CONSEQUENCES

Although Congress in recent years has curtailed some of the major tax benefits of military disability pay, considerable tax benefits remain. For those soldiers on active duty or in the reserves before September 24, 1975, all military disability pay is excluded from federal income taxation. Those soldiers coming on active duty after September 24, 1975, may have their disability income excluded if they are eligible for VA disability benefits; or they have a combat-related injury or sickness including conditions simulating war; or they have injuries incurred as a direct result of violent attacks which the Secretary of State determines to be a terrorist attack when the soldier is performing duties outside the United States.[158]

Even when a member is on active duty, some pay may be excluded from federal income tax as a result of disability. The Internal Revenue Code provides that a member may exclude military pay for up to two years if he or she is hospitalized after an injury or disease incurred in a combat zone. That provision allows officers to exclude up to $500.00 military pay per month and enlisted personnel to exclude all of their military pay.[159]

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[156]AR 635-40, app. C, para. C-12b.

[157]42 U.S.C. § 424a (1982).

[158]The principal relevant portions of the Internal Revenue Code dealing with military disability compensation may be found at I.R.C. § 104 (1954).

[159]*Id.* § 112.

Beginning in 1984, the sick pay exclusion of up to $100.00 pay per week has been eliminated.[160] In addition, up to one half of Social Security disability compensation which causes gross income to exceed $25,000.00 (single return) and $32,000.00 (joint return), is now taxable.[161]

Tax free compensation is a major benefit of military disability compensation for those who came on active duty before September 24, 1975. Portions of active duty pay may also be exempt from taxation for those injured in a combat zone. Disability compensation from the VA is also tax free. Social Security disability compensation is exempt, provided that the gross income of the recipient does not exceed certain dollar limitations.

XIII. JUDICIAL REVIEW OF MILITARY DISABILITY CASES

One major difference between the military disability retirement system and the Veterans' Administration disability system concerns the provisions for judicial review. Whereas military disability cases may be reviewed in the federal courts, administrative decisions by the VA concerning disability are not reviewable unless the claimant can allege a constitutional wrong.[162] Because there is no statutory prohibition for review, the courts have freely reviewed military disability cases.[163]

Although most cases are filed after the Army Board of Corrections of Military Records (ABCMR) has acted, there is no requirement that the ABCMR act first on a case. The final decision of the Secretary of the applicable service is sufficient.[164]

Until recently, a claimant could file suit in either the Court of Claims[165] or, if the claim for back pay was not greater than $10,000.00, in a United States district court.[166] With the advent of the Federal Courts Improvement Act,[167] claims in excess of

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[160]The sick pay exclusion was contained in *id.* § 105(d). This provision was repealed by Pub. L. No. 98-21, § 122(b), 97 Stat. 65 (1983).

[161]I.R.C. § 86 (1954).

[162]Johnson v. Robison, 415 U.S. 361, 367 (1974); Demarest v. United States, 718 F.2d 964 (9th Cir. 1983); 38 U.S.C. § 211(a) (1982).

[163]Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983).

[164]*Id.*

[165]28 U.S.C. § 1491 (1982).

[166]*Id.* § 1346. *See generally* Meador, *Judicial Review in Military Disability Retirement Cases*, 33 Mil. L. Rev. 1 (1966).

[167]Pub. L. No. 97-164, 96 Stat. 25 (1982), *discussed in* Retson, *The Federal Courts Improvement Act of 1982: Two Courts Are Born*, The Army Lawyer, Oct. 1982, at 20.

$10,000.00 are now tried in the United States Claims Court. Claims that are not greater than $10,000.00 can be tried in either the United States Claims Court or in the federal district court. Appeals of back pay actions from both the Claims Court and federal district courts are to the newly established United States Court of Appeals for the Federal Circuit.[168]

Once before a federal court, the standard of review is whether the administrative action by the military was "arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which [the complainant] has been seriously injured. . . ."[169]

The statute of limitations for actions of this nature is six years.[170] An issue may arise, however, concerning when the statute begins to run. Recently, a veteran asserting a claim from service in World War II successfully argued that the statute did not begin to run until his claim had been denied by the Army Board of Correction of Military Records (ABCMR). As the ABCMR can forgive an untimely filing when it is in the interest of justice, the court applied the date of the ABCMR decision as the date to begin the running of statute of limitations.[171]

A. PRIVACY ACT LITIGATION

Another recent and novel approach to overcome the six year statute of limitations and obtain a *de novo* review in the federal courts is to sue under the Privacy Act.[172] That act provides in part:

> (g)(1)*Civil remedies.*—Whenever any agency
>
> (A) makes a determination . . . not to amend an individual's record in accordance with his request, or fails to make such review . . . .
>
> . . . .
>
> (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determina-

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[168]28 U.S.C. §§ 1295, 1631 (Supp. I 1983).

[169]*Heisig*, 719 F.2d at 1156.

[170]28 U.S.C. § 4201(a) (1982) provides that civil actions against the United States must commence within six years after the cause of action first accrued.

[171]Yagjian v. Marsh, 571 F. Supp. 698 (D.N.H. 1983).

[172]5 U.S.C. § 552a (1982).

> tion relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual . . . .
>
> The *individual may bring a civil action* against the agency, and the district courts of the United States shall have jurisdiction . . . .
>
> (2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the *court may order the agency to amend the individual's record in accordance with his request* or in such other way as the court may direct. In such a case the court shall determine the matter *de novo*.[173]

If the claimant "substantially prevails," the Act also allows the award of litigation costs and attorneys' fees.[174]

In a recent case using this method of judicial review, *R.R. v. Department of Army*,[175] the plaintiff convinced the court to amend not only the facts in his records but also the conclusions that derived from those facts.[176] The court, however, did not award damages. The essential part of the decision is:

> The language of the Act establishes that an individual may bring a civil action to compel the correction of inaccurate records . . . Although defendant would confine the scope of this cause of action to amending purely factual misrepresentation, the Court does not so narrowly interpret the statute . . . It would defy common sense to suggest that only factually erroneous assertions should be deleted or revised, while opinions based solely on these assertions must remain unaltered in the individual's official file. An *agency may not refuse a request to revise or expunge prior professional judgments once all the facts underlying such judgments have been thoroughly discredited*. This position is reinforced in the Act's legislative

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[173]*Id.* § 552a(g)(1) (emphasis added).

[174]*Id.* § 552a(g)(1)(2)(b).

[175]482 F. Supp. 770 (D.D.C. 1980). *See* Annot., 55 A.L.R. Fed. 338 (1980).

[176]*See* Joyce, *The Privacy Act: A Sword and a Shield But Sometimes Neither*, 99 Mil. L. Rev. 133, 140 (1983). The author also details the administrative procedures for making requests under the Privacy Act and discusses the interrelationship between the Privacy and Freedom of Information Acts.

> history, where there are clear indications that insidious rumors and unreliable subjective opinions as well as simple factual misrepresentations fall within the ambit of the Act's strictures.[177]

In *Rosen v. Walters*,[178] another claimant, suing under the Privacy Act, attempted to attack indirectly the statutory prohibition against reviewing VA decisions.[179] The Ninth Circuit held that the Privacy Act could not be used to surmount the statutory denial of judicial review. However, the court stated that the section of the Privacy Act requiring the agency to amend records does apply to the VA.

As the military is not subject to a statutory preclusion of review, it appears that military administrative determinations are reviewable under the Privacy Act to include, in appropriate cases, the awarding of damages and attorneys' fees. The substantial advantage to plaintiffs is that, when the cases are reviewed in the federal courts under the Privacy Act, the review is *de novo*. Development of future military disability law in the federal courts may result from veterans filing suit under the Privacy Act to amend their records.

B. MILITARY DISABILITY COMPENSATION AND THE FERES *DOCTRINE*

Suits against the federal government by active duty service members for torts arising out of activities incident to service were barred by the Supreme Court in *Feres v. United States*.[180] However, military personnel could sue the government under the Federal Tort Claims Act[181] if their claims bear no relationship to military service.[182] A cornerstone of the "*Feres* doctrine" cited by the Supreme Court was:

> This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which

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[177]R.R. v. Department of Army, 482 F. Supp. at 773-74. This case should be compared with Blevins v. Plummer, 613 F.2d 767 (9th Cir. 1980). In *Blevins*, the court refused to grant relief under the Privacy Act becaue the plaintiff asked that the judgment of an Air Force promotion board be amended, rather than asking that errors of fact be corrected.

[178]719 F.2d 1422 (9th Cir. 1983).

[179]38 U.S.C. § 211(a) (1982).

[180]340 U.S. 135 (1950).

[181]28 U.S.C. §§ 1346(b), 2671-2680 (1982).

[182]Brooks v. United States, 337 U.S. 49 (1949).

> provide systems of *simple, certain, and uniform compensation for injuries or death of those in armed services.*
>
> . . . . The compensation system, which normally requires no litigation, is not negligible . . . The recoveries compare favorably with those provided by most workmen's compensation statutes.[183]

Because of the *Feres* doctrine, soldiers have had little success in suing the government for medical malpractice or other negligence. If the malpractice is by military doctors and the soldier is on active duty, the claim will fail.[184] In a recent case, the parents of a soldier sued the government, alleging that the government improperly treated and released their son after diagnosing his condition as paranoid schizophrenic. After being released, the soldier committed suicide. Even though he was home pending a medical discharge, the court determined that the alleged tort was incident to service and barred by *Feres*.[185] Had the malpractice taken place after discharge from service in a VA hospital, the claim would not have been barred by *Feres*. The rationale for this result is that there is no threat to military discipline by allowing suits for negligence against the VA.[186]

The *Feres* doctrine limits soldiers, injured as a result of medical malpractice in military hospitals, to disability compensation from the military or VA. However, alert plaintiffs may still sue third parties, for example, under a products liability theory, for negligence.[187] Although the miltiary disability and VA disability systems are generous, they do not approach the awards that may arise out of malpractice litigation; for example, the disability systems of the military and the VA do not compensate soldiers for pain and suffering or provide for punitive damages or attorneys fees.

XIV. CONCLUSION

The military disability system has evolved and matured over the past 35 years. Government largesse is not unlimited. Benefits, particularly federal income tax breaks, have been reduced. However, the the military disability system continues to be generous to those who qualify.

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[183]*Feres*, 340 U.S. at 144-45 (emphasis added).
[184]Johnson v. United States, 631 F.2d 34 (5th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981).
[185]Hopkins v. United States, 567 F.Supp. 491 (E.D.N.Y. 1983).
[186]United States v. Brown, 348 U.S. 110 (1954).
[187]10 U.S.C. § 1401 (1982).

The military disability system, with its multiple stages of review and "a full and fair hearing requirement," amply protects the rights of disabled soldiers. However, for the system to work effectively, those soldiers who have avoided the system and taken up critical positions on the manning tables should be screened and processed through the disability system. In this way, scarce personnel resources can more effectively be utilized by retaining on active duty only those who are medically qualified for any geographic assignment.

Because of past abuses, the system has been subjected to administrative limitations, such as the presumption of fitness rule, which significantly reduces military disability benefits for those who opt to remain on active duty after incurring a disabling condition. Although successul in its original purpose, however, that rule has caused a disproportionate number of soldiers to lose all military disability benefits. Some of the monetary losses to veterans in disability compensation caused by the rule are offset by the VA. However, important and valuable "ID card" benefits continue to be denied for those who would otherwise be entitled. A change to AR 635-40, requiring soldiers to be fit under field conditions in a worldwide environment, may soften the impact of the rule on Army personnel. That change, in addition to facilitating the screening of all soldiers with serious profiles, may make it easier for soldiers to prove that they were, because of their physical disability, improperly retained on active duty and qualify under an exception to the presumption of fitness rule.

If the presumption of fitness rule is not eliminated, it ought only apply to those who are eligible for non-disability retirement. This would end the current injustice of denying all military disability retirement benefits solely because of the presumption of fitness rule. The rule, if modified in this fashion, would still discourage abuses by denying disability retirement with its significant tax benefits to those soldiers eligible for retirement.

The major effect of the presumption of fitness has been to deny senior officers the increased tax benefits accruing from a military disability retirement. Because most general and flag officers retire at 30 or more years of active service, they are entitled to the maximum disability and non-disability pensions.[188] The difference between the two pensions is the amount of retired pay that will be tax free.

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[188]Both disability and non-disability retirement are limited to 75 percent of base pay. Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666 (1977).

As the review of all disability retirements of general, flag and Medical Corps Officers is already required by statute, potential abuses by those groups can be closely monitored. Applying the broad scope of the presumption of fitness rule to all classifications of soldiers is unnecessary. If the rule is not changed, all soldiers who have serious physical or mental impairments should be advised early in their treatment process of the consequences of the presumption of fitness rule.

To avoid the issue of the burden of proof in judicial review, litigation of military disability cases will increasingly be brought under the Privacy Act. The "arbitrary and capricious" standard and the judicial deference to the factual determinations of Army PEBs may no longer be adequate to withstand the potential onslaught of new cases. Plaintiffs may now sue to amend their records and obtain a *de novo* hearing. To protect its interests, the government must insure to an even greater degree that soldiers' medical records are accurate and complete.

THE ISRAELI AERIAL RAID UPON THE IRAQI NUCLEAR REACTOR AND THE RIGHT OF SELF-DEFENSE

Lieutenant Colonel Uri Shoham*

I. INTRODUCTION

On June 7, 1981, Iraeli Air Force F-15 and F-16 aircraft bombed and completely destroyed an Iraqi nuclear reactor under construction, 12 miles south of Baghdad.[1] The reactor was of French design and French technicians were supervising its installation. As a result of the attack, one French technician was reported killed.[2]

On June 8, 1981, the Prime Minister of Irsael, Menachem Begin, during a press conference,[3] claimed that the installation had been a threat to the security of the state of Israel because Iraq had intended to use it to manufacture nuclear bombs for use against Israel. Prime Minister Begin emphasized that all the peaceful diplomatic measures had failed to stop the Iraqis before developing the bomb. Mr. Begin maintained that the attack could not be further delayed because the reactor was soon to be made operational; an attack subsequent to that event would expose the residents of Baghdad to a radiation hazard.

In denying the Israeli argument that the attack was an exercise of a legitimate right of self-defense, Israel was condemned by the United States and other friendly governments, as well as by the

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[1]For factual description of the event, *see* N.Y. Times, June 9, 1981, at A1; Wash. Post, June 9, 1981, at A1.

[2]*See* N.Y. Times, June 14, 1981, at A4; Wash. Post, June 9, 1981, at A1. *But see* Mallison & Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self Defense?*, 75 Vand. J. Transnat'l L. 417, 418 (1982). The authors, citing Iraqi President Saddam Hussein in a television interview, concluded that, in addition to the French technician, three Iraqi civilians were killed.

[3]*See generally* Russell, *Attack—and Fallout*, The Times Magazine, June 22, 1981, at 30 [hereinafter cited as Russell].

Arab, Moslem and communist countries.[4] On June 19, 1984, the United Nations Security Council unanimously adopted a resolution "strongly condemning the military attack by Israel as a clear violtion of the charter of the United Nations and the norms of international conduct."[5]

The American press was not receptive to the Israeli arguments and, generally speaking, most reports and dispatches were critical of the Israeli operation.[6]

W.T. Mallison and Sally V. Mallison, both international law scholars, not only concluded that the Israeli aerial attack was an act of aggression, but further stated: "The Middle East, and possibly the world now lives under the potential of nuclear obliteration brought on by the actions of the Government of Israel."[7] This article challenges that conclusion.

II. SELF-DEFENSE IN CUSTOMARY INTERNATIONAL LAW

The right of self-defense is a fundamental right in every legal system, although it remains the goal of any community to restrict the use of force by individuals. The concept of self-defense was developed for centuries by the international community and is known as an inherent right of any sovereign state. The scope of lawful use of force by individual states in the international community, just as by any other individual, must be related to the legal machinery for pacific settlements of disputes.[8]

The basic question concerns the conditions under which such a right might be invoked.

In their authoritative treatise, Professors McDougal and Feliciano expressed the view: "The principal requirement which the customary law of self-defense makes prerequisite to the lawful

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[4]*See supra* note 1; Letters to the President of the Security Council, SCOR Supp. (Apr.-June 1981), U.N. Docs. S/14509 to S/14532.

[5]S.C. Res. 478, 36 U.N. SCOR (2288th mtg.) (1981), U.N. Doc. S/Res/487 (1981).

[6]*See, e.g.*, Rubin, *That Israeli Raid on the Iraqi Reactor: the Facts—and Deeper Issues*, Christian Science Monitor, June 24, 1981, at 12; Russell, *supra* note 3.

[7]Mallison & Mallison, *supra* note 2, at 446.

[8]*See* Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Hague Recueil 45, 456 (1952) [hereinafter cited as Waldock] ("A legal system which merely prohibits use of force and does not make adequate provision for the peaceful settlements of disputes invites failure").

assertion of these claims are commonly summarized in terms of necessity and proportionality."[9] This approach, or variations of it, is generally accepted by international legal scholars.[10]

The degree of necessity is the most important precondition to the use of force in the exercise of legitimate self-defense. In appraising the conditions of necessity, various factors, including the nature of coercion applied by the opposing side, the relative size and power of the rivals, the nature of their objectives and the consequences if the objectives are achieved, the expectation of effective community intervention, and others,[11] must be considered. Necessity must be "great and immediate,"[12] "direct and immediate,"[13] or "compelling and instant."[14]

The other major requirement of self-defense is proportionality.[15] This principle includes limitations on means and time. The means used must be confined to the removal of the danger and must be reasonably proportionate to the specific object. The action must not be continued after the danger has been eliminated.[16] In other words, the rule of proportionality requires that the responding state's use of

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[9]M. McDougal & Feliciano, Law and Minimum World Public Order 217 (1961) [hereinafter cited as McDougal & Feliciano]. The Mallisons asserted that, in addition to the requirements of necessity and proportionality: "The customary law prescribes the use of peaceful procedures, if they are available as the first requirement of self-defense." Mallison & Mallison, *supra* note 2, at 419. This requirement seems not to be a separate requirement but simply a component of the "necessity" requirement.

[10]*See, e.g.*, W. Jenks, A New World of Law? 29 (1961) ("It [the right of self-defense] can be invoked only against a danger which is serious and actual or imminent. The measures taken must be reasonably limited to the necessity of protection, and proportionate to the dnger").

[11]McDougal & Feliciano, *supra* note 9, at 230.

[12]1 J. Westlake, International Law 300 (1904).

[13]W. Lawrence, The Principles of International Law 118 (2d ed. 1897).

[14]Schwarzenberger, *The Fundamental Principles of International Law*, 87 Hague Recueil 195, 334 (1955) [hereinafter cited as Schwarzenberger].

[15]*But see* H. Brownlie, International Law and the Use of Force by States 261 (1963) [hereinafter cited as Brownlie]. The author expressed the opinion: "Proportionality as a problem has received little attention from jurists and apart from the Webster formula, it was not until the period of the League that it was mentioned with any frequency."

[16]*See* Fawcett, 103 Hague Recueil 347, 365 (1961) [hereinafter cited as Fawcett].

force not exceed the intensity and magnitude reasonably necessary to affect its self-defense.[17]

The key for appraising the justification of using coercion in alleged self-defense is the concept of "reasonableness." The requirements of necessity and proportionality "can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context."[18] Stated differently: "the central point is that a target state is authorized to act unilaterally in self-defense when it reasonably expects that it must use the military instrument of national policy to preserve its physical integrity and continues existence as an effective participant in the world community processes."[19]

The initial decision concerning the necessity of using force in self-defense is made by the country claiming this right. Given the technology of modern conventional or nuclear warfare, any state must respond very quickly to an unlawful attack or a threat against its existence, independence, or territorial integrity. In most cases, a threatened nation will not be afforded the time to seek the approval of the organized international community before acting in self-defense. The first goal is to remove the danger, because, as Brierly has observed, "[seeking] authority to act from any outside body may mean disaster."[20] Nevertheless, it is generally accepted that the claim of the right of self-defense must be appraised and evaluated by the external body of the world community. The state's determination concerning the legal justification for its action cannot be final,[21]

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[17]McDougall & Feliciano, *supra* note 9, at 242, suggest:

> Proportionality in coercion constitutes a requirement that responding to coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objective of self-defense. For present purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necesitates responsive coercion.

As to the problem of using nuclear weapons against an attack by conventional weapon, *see* Brownlie, *supra* note 15, at 262-64.

[18]McDougal & Feliciano, *supra* note 9, at 218.

[19]Mallison, *Limited Naval Blockade or Quarantine—Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 Geo. Wash. L. Rev. 335, 360 (1962) [hereinafter cited as Mallison (Cuba)].

[20]J. Brierly, The Law of Nations 320 (5th ed. 1955).

[21]*See* Judgment of the International Military Tribunal for the Far East 68 (1948); Brierly, *supra* note 20, at 407; McDougal & Feliciano, *supra* note, 9 at 219; C. Jenks, A New World of Law? 203 (1969); G. Von Glahn, Law Among Nations 131 (1981).

although the consequences of delay and reliance on the international community must be a significant concern:

> The inevitable time-lay between initiation of highly intense coercion and appropriate determination and authorization by the general security organization, and the ever present possibility of the organization's failure to reach any determination at all, make such a recommendation [to get prior permission of the organized community] potentially disastrous for defending states.[22]

II. THE RIGHT OF ANTICIPATORY SELF-DEFENSE IN CUSTOMARY INTERNATIONAL LAW

It is generally accepted and assumed that customary law permits anticipatory use of coercion in a situation of imminent danger.[23] International law does not require a state to wait until it is actually attacked before taking measures of self-defense: "A state may defend itself by preventive means, if in its conscientious judgment [such means are] necessary against attack by another state, threat of attack, or preparation or other conduct from which an intention to attack may reasonably be apprehended."[24]

In appraising whether pre-emptive measures constitute legitimate self-defense, the capability of weapons involved, the reaction time, and the strategic situation should be appraised. However, the same requirements of necessity, proportionality and reasonableness of action, as in the case of self-defense against actual armed attack, apply to anticipatory self-defense, as well. In the case of pre-emptive violence, moreover, there is "a customary requirement that the expected attack exhibit so high a degree of imminence to preclude ef-

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[22]McDougal & Feliciano, *supra* note 9, at 219.
[23]*See* Brownlie, *supra* note 15, at 257; McDougal & Feliciano, *supra* note 9, at 231.
[24]Westlake, *supra* note 12, at 299.

fective resort by the intended victim to nonviolent modalities of response."[25]

One of the best illustrations of the customary law standards for anticipatory self-defense is the case of *The Caroline*. In 1837, during the Canadian insurrection, the steamer *Caroline* transported men and materials for the rebels from American territory into Canada across the Niagara River. The American government had appeared unable or unwilling to prevent this use of the vessel. On December 29, 1837, a British force from Canada crossed the Niagara, seized the steamer in the state of New York, set the vessel afire, and let it drift over Niagara Falls. During the skirmish, two American citizens were killed.[26] This incident became important mainly because of the letter from Secretary of State Daniel Webster to the British Ambassador, responding to the British argument that the action was justified as an act of self-defense. In his letter, Secretary Webster stated the conditions for the exercise of self-defense: "[n]ecessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."[27]

Those principles were generally accepted and were approved by the International Military Tribunal at Nuremberg.[28] However, those requirements may be too restrictive for modern times. It has been

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[25]McDougal & Feliciano, *supra* note 9, at 231. McDougal, *Some Comments On The 'Quarantine' of Cuba*, 57 Am. J. Int'l 592, 597 (1963) [hereinafter cited as McDougal] observed:

> The conditions of necessity required to be shown by the target state have never, however, been restricted to 'actual armed attack'—it is now generally recognized that a determination of imminence requires an appraisal of the total impact of an initiating state's coercive activities upon the target state's expectations about the costs of preserving its territorial integrity and political independence.

See also D. Bowett, Self Defense in International Law 191-92 (1958) [hereinafter cited as Bowett].

[26]Bowett, *supra* note 25, at 56-58; Brierly, *supra* note 20, at 405-06; J. Bishop, International Law 777 (2d ed. 1962).

[27]Webster continued:

> It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by the necessity, and kept clearly with it.

Id. For thorough analysis of Webster's formulation, *see Schwarzenberger*, *supra* note 14, at 332-33.

[28]The Tribunal stated: "It must be remembered that preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation (The Caroline Case)." 41 A.J. 205 (1947).

observed that "the standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis."[29]

Even Mallison, critical of the Israeli attack, has disapproved of Webster's formula: "The formulation was probably unrealistically restrictive when stated in 1841. In the contemporary era of nuclear and thermonuclear weapons and rapid missile delivery techniques, Secretary Webster's formulation could result in national suicide if it [was] actually applied instead of merely repeated."[30]

Application of this formula to the actual practice of nations we likely find that virtually every use of force would have to be considered unlawful coercion rather than the exercise of a legitimate right of self-defense.[31]

IV. THE RIGHT OF SELF-DEFENSE UNDER THE CHARTER OF THE UNITED NATIONS

The basic provisions of the United Nations Charter concerning resort to force by individual states in their international relations are found in Articles 2 and 51. Article 2(3) demands that the parties to any international dispute seek a settlement by peaceful means. Peaceful means, discussed in Article 33 of the Charter, include negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement. If those means fail, the parties are bound under Article 37 to submit the case to the Security Council.

Article 2(4) is considered the "cornerstone of the peace in the Charter."[32] This provision includes general prohibition of use of any kind of force or threat to use force against "the territorial integrity or political independence of any state. . . ." Article 2(4) does not prohibit, however, measures which do not involve armed force, such as economic measures of retortion or other unfriendly measures.[33]

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[29]McDougal & Feliciano, *supra* note 9, at 217.

[30]Mallison (Cuba), *supra* note 19, at 348. *See also* Westlake's criticism of the words "leaving no moment for deliberation." Westlake, *supra* note 24, at 300.

[31]For some other examples in which the requirements for anticipatory self-defense were dealt with, *see* Judgment of the International Military Tribunal for the far East 994 (1948); Trial of Major German War Criminals (H.M.S.O.) part 18, at 160, part 19, at 134-35; McDougal & Feliciano, *supra* note 9, at 232; Mallison (Cuba), *supra* note 21, at 349, (concerning the British attack on the Vichy French Navy in June, 1940).

[32]Waldock, *supra* note 8, at 492.

[33]*Id.* at 493-94. *See also* Brierly, *supra* note 20, at 445-16.

Article 51 of the United Nations Charter governs the use of force in self-defense.[34] The right of self-defense is recognized as one of the major exceptions to the provisions of Article 2(4). However, Article 51 is a source of confusion and ambiguity because the phrase "if an armed attack occurs" qualifies the entitlement of nations to exercise "the inherent right of individual or collective self-defense. . . ." Certain international law commentators and scholars have advocated the limited and literal interpretation of the right of self-defense under Article 51,[35] while others have insisted that Article 51 does not intend to limit the right of self-defense under customary law or to limit acts of preventive defense.

The second view, which considers the right of self-defense under customary law to be still available to members of the United Nations, seems to be much more convincing and persuasive. Although the justification for this approach may differ from one commentator to another, their common conclusion in interpreting Article 51 is the only logical and realistic one in the era of nuclear weapons. No one could seriously contend that any nation in the world should commit suicide by failing to prevent an imminent armed attack by its enemies.[36] The report of the committee which drafted Article 51 noted significantly: "The use of arms in legitimate self-defense remains admitted and unimpaired."[37]

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[34]Article 51 provides:

> Nothing in the present charter shall impair *the inherent right of individual or collective self-defense if an armed attack occurs* against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

(emphasis added).

[35]*See, e.g.*, H. Brownlie, *supra* note 16, at 275; Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 Am. J. Int'l L. 872, 873 (1947).

[36]Bowett, *supra* note 25, at 184-85 makes the basic assumption that:

> rights formerly belonging to member states continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter . . . it is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; on the contrary, they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter.

[37]6 U.N. CIO, at 459. This report was approved by Commission I and the Plenary Conference.

Many scholars agree. In Professor Bowett's opinion, there is no contradiction between the broader interpretation of Article 51 and Article 2(4), because any action of self-defense "cannot by definition involve a threat or use of force 'against the territorial integrity or political independence' of any other state."[38] Bowell concludes that Article 51 does not restrict the traditional right of self-defense and does not exclude preventive measures against imminent danger.[39]

Professor Waldock believes that "[i]t would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defense in resistance to an illegal use of force not constituting an 'armed attack.'"[40] The effect of the opposite interpretation would be, in Waldock's view, that "an imminent threat is no longer sufficient to create an immediate right to resort to force in self-defense."[41] Waldock further stated: "It would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps the fatal blow. . . . To read Article 51 otherwise is to protect the aggressor's right to the first stroke."[42]

Professors McDougal and Feliciano are of the opinion that "[i]t is of common record in the preparatory work on the Charter that Article 51 was not drafted for the purpose of deliberately narrowing the customary law permission of self-defense against a current or imminent unlawful attack by raising the required degree of necessity."[43]

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[38]Bowett, *supra* note 25, at 185-86. Bowett further determined that "the obligation assumed under Article 2(4) is in no way inconsistent with the right of self-defense recognized in international law." *Id.* at 186.

[39]*Id.* at 191 ("It is not believed, therefore that Art. 51 restricts the traditional right of self-defense so as to exclude action taken against an imminent danger but before 'an armed attack occurs'. In our view such a restriction is both unnecessary and inconsistent with Art. 2(4) which forbids not only force but the threat of force, and furthermore, it is a restriction which bears no relation to the realities of a situation which may arise prior to an actual attack and call for self-defense immediately if it is to be of any avail at all").

[40]Waldock, *supra* note 8, at 497-98.

[41]*Id.* at 498.

[42]*Id.*

[43]McDougal & Feliciano, *supra* note 9, at 235. The authors suggest:

> The moving purpose was, rather, to accommodate regional security organizations (most specifically the Inter-American system envisioned by the Act of Chapultepes) within the Charter's scheme of centralized, global collective security, and to preserve the functioning of those regional systems from the frustration of vetoes cast in the Security Council.

Id. at 235. After discussing the preparatory work and the drafters' intentions, McDougal and Feliciano determined: "The second major difficulty with a narrow reading of Article 51 is that it requires a serious underestimation of the potentialities both of the newer military weapons systems and of the contemporary techniques of nonmilitary coercion." *Id* at 238.

Articles 2(4) and 51 may compatibly be read together. In Article 2(4) of the U.N. Charter the members of the United Nations committed themselves not only to refrain from the use of force but also to refrain from the threat to use force against another country. By interpreting Article 51 as including self-defense against an imminent threat to use force, a sanction is raised against a violation of the obligation of Article 2(4) to refrain from threat to use force.[44] Consequently, the "inherent right of . . . self-defense" under Article 51 should include reasonable anticipatory defense. This is the only way to interpret this Article if it is to have any meaning in an age of nuclear weapons and missiles. This interpretation is fully consistent with the objectives and the purposes of the United Nations Charter to "maintain international peace and security"[45] and at the same time provides an effective means of national self-defense.[46]

V. THE CUBAN MISSILE CRISIS AND THE RIGHT OF SELF-DEFENSE

Most commentators on the legality of United States' activities during the Cuban Missile Crisis have sought to justify the naval quarantine based upon the right of self-defense.[47] At the same time, sur-

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[44]*See* Mallison (Cuba), *supra* note 21, at 363.

[45]U.N. Charter art. 1(1).

[46]For further discussion of this subject, *see* M. Whiteman, Digest of International Law 48-51 (1971); Fawcett, *supra* note 16, at 361-65; Schwarzenberger, *supra* note 14, at 336-39. It is also important to mention in this context the memorandum submitted to the United Nations Atomic Energy Commission by the United States, in which it was said:

> It is . . . clear that an 'armed attack' [as used in Article 51 of the U.N. Charter] is now something entirely different from what it was prior to the discovery of atomic weapons. It would, therefore, seem to be both important and appropriate under present conditions that the treaty define 'armed attack' in a manner appropriate to atomic weapons, and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.

Quoted in Fawcett, *supra* note 16, at 362.

The Commission in its first report to the Security Council, in 1946, stated: "In consideration of the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defense recognized in Article 51.—Where there is no treaty the case would be even stronger." U.N. Docs. AEC/18/Rev. I, at 24.

[47]*See, e.g.*, Campbell, *The Cuban Crisis and the U.N. Charter: An Analysis of the United States Position*, 16 Stan. L. Rev. 160 (1963); Christol, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962*, 57 Am. J. Int'l L. 525 (1963); Fenwick, *The Quarantine Against Cuba: Legal or Illegal?*, 57 Am. J. Int'l L. 588 (1963); MacChesney, *The Soviet-Cuban Quarantine and Self-Defense*, 57 Am. J. Int'l L. 597 (1963); McDougal, *supra* note 25; Mallison, *supra* note 19; Partan, *The Cuban Quarantine—Some Implications for Self Defense*, 1963 Duke L.J. 696; Wright, *The Cuban Quarantine*, 57 Am. J. Int'l L. 546 (1963).

prising as it is, the official position of the United States was *not* to invoke Article 51 of the U.N. Charter and the right of self-defense but to rely upon the "collective [security] measures" permitted by Article 52(1) of the Charter.[48] Despite the official justification offered by the United States, the relation between the Cuban Missile Crisis and the right of self-defense has particular relevance to the Israeli operation.

In his address to the nation on October 22, 1962, President Kennedy stated that the United States armed forces were ordered to interdict the delivery of offensive weapons and associated material to Cuba.[49] The implementation of this order involved "extensive deployment of military forces in the Caribbean, boarding and searching of vessels bound for Cuba, and intensive penetration of Cuban air space by reconnaissance planes."[50] Moreover, the President made clear that "should these offensive military preparations continue, thus increasing the threat to the hemisphere, further action will be justified."[51]

In spite of the successful conclusion of the Cuban crisis,[52] some questions about the legality of the quarantine still remain. Two of those questions, which seem to be common to the Cuban quarantine and the Israeli raid, are discussed here.

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[48]*See* Campbell, *supra* note 47, at 165-66. Arbram Chayes, then the Legal Adviser of the State Department, stated: "The president in his speech did not invoke Article 51 or the right of self-defense. And the O.A.S. acted not under Article 3 [of the Rio Treaty], covering cases of armed attack, but under Article 6, covering threats to the peace other than armed attack." Chayes, *The Legal Case for U.S. Action in Cuba*, 47 Dep't State Bull. 763, 764 (1962). *See also* Chayes, *Law and the Quarantine of Cuba*, 41 Foreign Affairs 550 (1963).

In spite of this clear evidence, Mallison insisted: "The actions of the President of the United States referred to in section I constitute unequivocal invocation of the claim to national self-defense." Mallison (Cuba), *supra* note 21, at 353. However, a thorough reading of the Presidential address of October 22, 1962 and the Presidential proclamation of October 23, 1962 does not support this view. President Kennedy mentioned neither the right of self-defense nor Article 1 of the U.N. Charter. In contrast, he stated in his speech on October 22: "The United Nations Charter allows for regional security arrangements and the nations of this hemisphere decided long ago against the miltiary presence of outside powers." N.Y. Times, Oct. 23, 1962 at A18.

[49]Proclamation No. 3504, 27 Fed. Reg. 10401 (1962).

[50]Campbell, *supra* note 47, at 160.

[51]Proclamation No. 3504, 27 Fed. Reg. 10401 (1962). In a briefing of correspondents at the Pentagon on October 22, "The Secretary of Defense made very clear that 'whatever force is required'—even sinking—would be used to prevent ships from trying to run the blockade." N.Y. Times, Nov. 3, 1962 at A7.

[52]On October 28, 1962, the Soviets decided to remove the offensive missiles from Cuba and to stop work on weapons construction sites. The blockade was lifted by the United States on November 20, 1962.

A. THE THREAT

The presence of missile sites or nuclear weapon in Cuba did not *per se* constitute a threat against the United States and the Western Hemisphere. Their presence, only when considered together with other factors, created a real threat. The most important factor to consider is the purpose behind the introduction of the missiles and the Soviet intention for subsequent use.[53]

Professor Quincy Wright has suggested that Cuba had legitimate reasons to fear armed attack by the United States against her.[54] He continues: "No satisfactory evidence has been presented to indicate that Khruschev's purpose in sending the missiles was other than to deter attack on Cuba, and his willingness to withdraw them when the United States made the conditional pledge not to invade Cuba would support this defensive intent on his part."[55]

Conversely, however, it can be argued that the aggressive intentions of the Soviet Union and Cuba were clear. Those who share this view base their opinion on the past record of the Soviet Union, as well as on the totalitarian nature of the regimes in both the Soviet Union and Cuba.[56]

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[53]*See* Fenwick, *supra* note 47, at 589 ("The first factor would be the purpose of setting up the missile bases. If the purpose is defensive rather than offensive not one could seriously argue that it constitutes a threat on any other country. In order to estimate the intention which is usually not to be found on the surface, we must consider all the surrounding circumstances").

[54]Wright, *supra* note 47, at 549-50 observed:

> Khruschev and Castro claimed that the missiles were shipped to, and installed in Cuba only for that purpose [the defense of Cuba]. Khruschev had promised that he would assist in the defense of Cuba and it can hardly be doubted, in view of the Bay of Pigs affair, the President's somewhat ambiguous statement after the incident, the economic measures taken by the United States to embarrass the Castro regime, and public demands for invasion of Cuba by many American politicians, particularly during the election campaign of 1962, that Castro was justified in believing he needed assistance in defense. Furthermore, he may well have consdiered that the deterrent influence of medium-range missile, threatening American cities, was the only feasible defense against the overwhelming naval, military, air and missile power which the United States was capable of launching against Cuba.

[55]*Id.* at 553.

[56]Fenwick, *supra* note 47, at 589-90 observed:

> The record of the Soviet Union in Hungary and East Berlin, and the effectionate embrace of Marxist-Leninst doctrine by Prime Minister Castro pointed clearly in that direction. Even if not used, the mere presence of the missile bases would have give the Government of Cuba the opportunity for blackmail, and it would have altered the "balance of terror" heavily in favor of Russia.

See also Mallison (Cuba), *supra* note 19, at 359.

B. IMMINENCE OF THE DANGER

McDougal and Feliciano stated, concerning the degree of imminence of danger that can precede a valid exercise of the right of self-defense:

> There is a whole continuum of degrees of imminence or remoteness in future time, from the most imminent to the most remote, which, in the expectation of the claimant of self-defense, may characterize *an expected attack*. Decision makers sought to limit lawful anticipatory defense by projecting a customary requirement that the *expected attack* exhibit so high a degree of imminence as to preclude effective resort by the intended victim to non-violent modalities of response.[57]

Was the danger to the territorial integrity or political independence of the United States imminent? The answer would be affirmative if the mere deployment of nuclear missiles in Cuba was considered as "the danger" to the United States. In fact, the missile sites in Cuba had almost been completed and Soviet ships carrying the missiles and their components were on their way to Cuba. As was mentioned by McDougal: "Even a few days' delay by the United States in taking appropriate measures would have meant that the missiles would be in place and the situation irreversible"[58]

However, if "the danger" is seen as a threat to start an actual armed attack, the answer must be that the danger was not imminent. No one could say when, if at all, those missiles would have been used against the United States or against other countries: "Dangerous as they are, customary international law did not consider such 'displays of force' illegal so long as they remained on the high seas or on the state's own territory, *unless there was evidence of an immediate intention to use them for attack.*"[59]

It seems to be mere speculation to assert that the Soviet Union or Cuba would have used the missiles to threaten the independence and territorial integrity of other nations.

Perhaps the difficulty in answering this question is due to the use of the term "expected attack."[60] However, it is impossible to deal

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[57]McDougal & Feliciano, *supra* note 9, at 231 (emphasis added).
[58]McDougal, *supra* note 25, at 601-02.
[59]Wright, *supra* note 47, at 549 (emphasis added).
[60]*See supra* note 57.

with this question without considering some other factors. The past conduct of the participants and the conduct of the alleged aggressor are particularly relevant. The danger of attack would be more imminent if an irresponsible and totalitarian regime with a record of waging aggressive wars in the past were involved.

Further, the nature of the weapons involved and the capability of the opponent to use them effectively are significant factors. Generally speaking, it can be argued that, if there is enough evidence to show that the other side is planing an attack using weapons of mass destruction, the right of self-defense may be invoked, even though the exact date of the expected attack is unknown.[61] However, it is clear that the use of coercion must be a last resort after exhausting all peaceful means.

VI. THE ISRAELI ATTACK ON THE IRAQI NUCLEAR REACTOR

From a military point of view, the Israeli operation against the Iraqi reactor was a great success. The planes flew over more than 1,000 miles, through hostile Arab airspace, accomplished their mission, and returned safely to their base. The loss in life was minimal and no damage was reported other than the complete destruction of the nuclear reactor. This article further contends that doubts about the legality of the attack must also be resolved in Israel's favor. The criteria developed by Professors McDougal and Feliciano[62] to evaluate a claimed self-defense situation lead to this conclusion.

A. THE ATTITUDE OF THE IRAQI REGIME TOWARDS ISRAEL

The first criterion used by McDougal and Feliciano involves a study of the "characteristics of the participants,"[63] *i.e.*, a factual description of the countries involved in the conflict.

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[61]*See, e.g.*, Fenwick, *supra* note 47, at 588. Fenwick raised the question concerning the deployment of the nuclear missiles in Cuba: "Was there an armed attack?" and his answer: "Clearly not, in the old traditional sense. But clearly so, if we are to regard an atomic warhead, ready to be fired from a missile base, as a potential or constructive armed attack when in the hands of one whose intentions could easily be read from his past conduct . . . *there would be nothing left to defend, if the victim were to await concrete evidence of the attack*." (emphasis added).

[62]McDougal & Feliciano, *supra* note 9, at 220-44.

[63]*Id.* at 220.

Iraq, for over than 33 years, has been led by one of the most extreme regimes in the Middle East. It has been committed since 1948 to the destruction of Israel. Iraq has called for the elimination of the "Zionist entity"[64] even though the two countries share no common border. In an interview with a Lebanese weekly, Iraqi Foreign Minister Hamadi stated: "Iraq cannot agree to the existence of Zionism—neither as a movement nor as a state. . . . The Arab nation cannot agree to the amputation of any part from its body . . . because the land of Palestine is an Arab land and we cannot conceive giving it up. . . . The struggle against Zionism is for us a struggle in which there can be no compromise."[65]

Iraq has categorically refused to recognize Israel's right to exist and is unconditionally opposed to any negotiations with it. Iraqi President Saddam Hussein has declared: "Naturally, as you know, the Zionist entity is not included because the Zionist entity is not considered a state, but a deformed entity occupying an Arab territory."[66]

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[64]Iraq has never used the term "Israel" when dealing with the Jewish state, but rather, the "Zionist entity".

[65]Al-Jumhur Al-Jadid, Jan. 31, 1980.

[66]U.N. Docs. A/35/110; S/13816 (27 Feb. 1980). In a speech before the "National People's Conference" in Baghdad on March 27, 1980, President Hussein stated: "I do not think that there is anyone who believes that the monstrous Zionist entity conquering our land really constitutes a state. On the contrary, we disagree with some Arab regimes and organizations because of our belief that Arabs must not give their signature and agreement to the recognition of the monstrous Zionist entity, even within the borders of 5 June 1967." Al-Jumhuriyya, Iraq, Mar. 28, 1980. On June 18, 19, and 25, 1980, the Senate Committee on Foreign Relations conducted a hearing on the Israeli operation. *The Israeli Air Strike: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. (1981) [hereinafter cited as Hearings]. In his testimony before the Committee, Prof. Mallison was asked:

> You criticized Israel for not having exhausted peaceful diplomatic means of redress before resorting to the military option. Do you believe it would have been plausible for Israel to deal with Iraq directly, given Iraq's refusal to concede even the existence of Israel?" In his response, Prof. Mallison said: "What Israel are they [Iraq and other Arab states] supposed to recognize? Are they supposed to recognize the one within the pre-June 1967 boundaries, or including Gaza, Golan Heights and the West Bank? It seems to me if we could define Israel as a state with precise limitations, rather than continuing expansion, *it would make it much, much easier for Iraq and other states to recognize it.*"

Id. at 252 (emphasis added). It seems clear from the Iraqi President and other Iraqi officials' statements that they are not willing to recognize Israel as a state, regardless of its boundaries.

Iraq participated in every war between the Arab countries and Israel and still maintains a state of war with Israel.[67] After Israel's War of Independence, Iraq refused to conduct any armistice negotiations with Israel.[68] Iraq also refused to agree to a ceasefire during the Six Day War and has consistently rejected the key Security Council Resolutions 242 and 338 concerning the legal basis for peaceful settlement in the Middle East. Iraq has totally rejected the peace agreement between Egypt and Israel.[69]

Iraq is known for its support of terrorism. The United States government had long identified Iraq as one of the major sponsors of international terrorism, particularly terrorism against Israel.[70] Iraq is a major supporter and financier of the terrorist activity of the Palestine Liberation Organization. It considers itself as the leader of the Arab countries in the fight for the "liberation of Palestine."[71]

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[67]In Israel's War of Independence, Iraq's army, together with the regular armies of Egypt, Transjordan, Syria and Lebanon, invaded Israel. The Iraqi forces fought in the Jordan valley region, in Samaria, and on the Sharon Plain. *The Iraqi Nuclear Threat—Why Israel had to Act, The Government of Israel*, Jerusalem (1981) [hereinafter cited as The Israeli Document]. During the Six Day War of June 1967, an Iraqi brigade entered Jordan and took part in some battles on that front. The Iraqi Air Force also participated in the hostilities. Between 1967 and 1970, Iraqi forces took part in shelling Israel villages in the Jordan Valley during the War of Attrition. Iraq also became part of the "Eastern Front," a joint military command which included Iraq, Syria, Jordan, and Saudi Arabia. In the Yom Kippur War, started on October 6, 1973, two Iraqi divisions, two infantry brigades, an various commando units were deployed on Syrian front on the Golan Heights. The Iraqi forces were involved in bloody battles with the Israeli forces. *Id.* at 5-6.

[68]It is true that the Iraqi Foreign Minister stated on February 13, 1949: "[T]he terms of armistice which will be agreed upon by the Arabs States neighbours of Palestine namely Egypt, Transjordan, Syria and Lebanon will be regarded as acceptable to my Government." Mallison & Mallison, *supra* note 2, at 433. However, unlike other Arab states which negotiated the armistice agreements with Israel, Iraq refused to do so fearing that it would be considered a sort of recognition.

[69]*See* Pace, *Iraq, as Usual, Takes the Hardest Line of All*, N.Y. Times, Nov. 28, 1976: "The radical Iraqi Regime has been continuing its reasonantly anti-Israel declarations this autumn even as a realignment among other Arab nations has bred anticipation for progress toward an overall Middle East settlement . . . *Iraq's attitude towards Israel has been notably hostile, even by Arab standards, for decades. The Baghdad Government announced on Oct. 22, 1973 when the Security Council called for a ceasefire in the October War, that Iraq did not consider itself 'a party to any resolution, procedure or measure in armistice or cease-fire agreement or negotiations or peace with Israel, now or in the future.'*" (emphasis added).

[70]In 1980, the Department of State declared: "The government of Iraq is a major supporter of rejectionist Palestinian elements which repudiate a negotiated settlement to the Arab-Israeli dispute. The rejectionist Palestinians include groups which use terrorism as a policy instrument." *See Hearings, supra* note 66, at 82 (citing letter from the American Israel Public Affairs Committee to the Chairman of the U.S. Senate Foreign Relations Committee, June 16, 1981 [hereinafter cited as Letter]).

[71]In an interview with the Lebanese Weekly Al-Hawadith (Apr. 17, 1981), President Hussein said: "As for the Iraqi, when we tell him that he is called upon to stand at the head of the liberation of Palestine, he understands what the intention is and what he must do, as this [The liberation of Palestine] is the bsais of the Ba'ath Party."

On September 9, 1980, the Iraqi Forces invaded Iran. While one Army crossed the border near Baghdad, a second Army advanced across the Shatt al Arab waterway into Khuginstan, Iran's oil-rich province. There is no doubt that the Iraqi invasion of Iran was an act of aggression, without legal justification.[72]

Based on the available evidence, it is apparent that the Iraqi regime is one of the countries most hostile towards Israel. Its purpose to destroy and eliminate Israel as a state is clear; its past conduct and the statements of its rulers allow of no other conclusion.[73]

B. THE THREAT—THE IRAQI NUCLEAR REACTOR

Iraqi nuclear activities began in 1957 with an agreement with the Soviet Union under the terms of which the Soviets built a nuclear center in Baghdad. The Soviets also built laboratories for research and production of radioisotopes. This nuclear reactor began its operation in 1969 with a capacity of two Megawatts thermal.[74]

In 1975, Iraq signed a nuclear cooperation agreement with France. Iraq chose a very advanced Osiris type research reactor. Of all available research reactors, the Osiris type is among the most suitable for the production of weapons-grade plutonium in significant quantities.[75] The Iraqi choice of an Osiris-type reactor is but one indication of the Iraqi intention to produce nuclear bombs.

There are two ways of producing fissionable material necessary for a nuclear explosive; the first is the plutonium option and the other is the uranium option. The Iraqis could use their nuclear reactor for

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[72]*See* M. Gordon, Conflict in the Persian Gulf 157 (1981).

[73]It is astonishing to find that, in the Mallisons' analysis of "the participants—Claimants and their Objectives" dealing with Iraq, nothing has been said about the Iraqi regime and its attitude towards Israel. The Mallisons did not mention the participation to the destruction of Israel. Nor did the Mallisons mention Iraq's support to terrorism as well as its aggressive war in teh Persian Gulf. Mallison & Mallison, *supra* note 2, at 426.

[74]Israeli Document, *supra* note 67, at 9. MW(th) is the customary unit in which the thermal capacity of a reactor is defined.

[75]*Id.* at 10. *See also* Hearings, *supra* note 66, at 124 (testimony of Dr. Solden): "This specific reactor has enriched uranium metal as fuel elements, that metal is possible to use in constructing weapons. There is no question that plutonium can be produced in this reactor, perhaps enough plutonium for a small number of weapons per year".

both the plutonium and the uranium options.[76] Speaking about the plutonium option, Roger Richter, a former inspector for the Middle East Region of the International Atomic Energy Agency (IAEA), stated:

> As an inspector you have become aware that as much as 17 to 24 kilograms of plutonium could be produced each year with the Osirak reactor. Even if only one third of this amount was produced in the first few years of operation of the ractor . . . Iraq could acquire a stockpile of plutonium sufficient to make several atomic bombs.[77]

There was no question about the capability of Iraq to manufacture nuclear weapons in the near future; the next issue involves whether the Iraquis intended to actually produce nuclear weapons.

In August 1980, Iraqui President Saddam Hussein discussed a proposal to boycott any nation maintaining an embassy in Jerusalem. Hussein said: "Some people ask if this [boycott] decision is the best that can be taken. No, a beter decision would be to destroy Tel Aviv with bombs. But we have to use the weapons available until it is actually possible to respond to the enemy with bombs."[78]

On October 4, 1980, in a newspaper published by the Iraqi Information Ministry appeared:

> We ask Khomeini and his gang: who is going to benefit from destroying the Iraqi nuclear reactor—is it Iran or the Zionist entity? This reactor does not constitute danger to Iran because Iraq looks at Iranian people with a brotherly look. . . . *The one who fears the Iraqi nuclear reactor is the Zionist entity.*[79]

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[76]The Iraqi reactor, Tammuz I, could be used for irradiating natural (or depleted) uranium for the production of plutonium. In order to produce 7-10 mg of weapon-grade plutonium annually, an annual uranium consumption of about 10 tons is required. The second option is the diversion of the reactor's fuel for manufacturing weapons-grade material. The fuel load of the reactor is 12 kg of uranium enriched to 93% (U235) which can be used for a nuclear bomb. Enriched uranium is uranium having a greater abundance of U235 than uranium found in nature [0.7%] and can serve, at a high level of enrichment, as the fissionable material required for the manufacture of nuclear weapons. A year's supply of fuel consists of about 50 kg of highly enriched uranium, an amount sufficient for the manufacture of at least two nuclear bombs. Israeli Document, *supra* note 67, at 14.

[77]Hearings, *supra* note 66, at 111 (testimony of Mr. Richter), 128 (testimony of Dr. Kouts and Dr. Solden).

[78]Broadcast by Baghdad's "Voice of the Masses" and recorded by FBIS on August 21, 1980.

[79]Al-Jumhuriya, Oct. 4, 1980, at 1 (emphasis added).

Iraqi intentions had evidenced themselves several years earlier. Naim Haddad, a member of Iraq's ruling Revolutionary Command Council, said in 1977: "The Arabs must get a [nuclear bomb]."[80] At the beginning of negotiations with France in 1974, Saddam Hussein was quoted by a Lebanese newspaper as saying that the nuclear program would be "the first Arab attempt toward nuclear arming, although the official declared purpose of construction of the reactor is not nuclear weapons."[81]

In addition to these statements, there were other clear indications of an Iraqi intention to develop an atomic bomb. One of these was the refusal by the Iraqis to accede to the French suggestion to replace the high-enriched uranium with a low-enriched fuel known as carmel which would have been suitable to operate the reactor but which would not have allowed production of weapons-grade mterial.[82] Another indication was the massive acquisition by the Iraqis of tons of natural uranium, the only explanation for which was an intention to develop nuclear weapons. At the Senate hearings into the Israeli attack, Roger Richter noted:

> [I]f you look at the evidence that exists, if you look at the kind of program that they have underway, if you look at the 200,000 pounds of yellowcake which they bought for God only knows what reason, you become very suspect. . . . There is an old expression: if it walks like a duck, swims like a duck, flies like a duck and quacks like a duck, well, then, it's a duck.[83]

Moreover, the Iraqis purchased a 70 megawatt reactor, much larger than one would expect that a country like Iraq would need for research.[84]

On several occasions, United States officials and members of Congress expressed their concern about the Iraqi nuclear program. On

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[80]The Times Magazine, June 22, 1981, at 25.

[81]*Id.* (emphasis added).

[82]In an attempt to eliminate the danger inherent in the uranium option, France suggested a shift towards a low-enriched fuel (carmel). Israeli Document, *supra* note 67, at 14; Letter, *supra* note 70, at 81.

[83]Hearings, *supra* note 66, at 128. *See also* Letter, *supra* note 70, at 81 (quoting the Nucleonics Week Report: "Iraq bought 300 tons of yellowcake [Uranium concentrate prepared by the exraction of uranium from ores], which has absolutely no capability to fabricate into any commercial. In addition Iraq is known to have purchased from Common Market countries about five tons of natural uranium processed for potential use as a breeding blanket and another five or so of depleted uranium also with blanket potential").

[84]*See* Letter, *supra* note 70, at 81.

March 17, 1981, Senator Alan Cranston warned in a speech on the Senate floor that "Iraq could develop a nuclear weapon by the end of [1981]."[85] Secretary of State Alexander Haig noted that the Reagan administration was "concerned about manifestations in Iraq" and "very sensitive to the spread of nuclear capabilities."[86]

Even top-level French nuclear experts expressed concern over the reactor supplied by France to Iraq and its possible use to manufacture nuclear weapons.[87]

Thus, there can be no doubt about the Iraqi intention to develop nuclear weapons and to use them against Israel. The only question that remains is how soon Iraq could have produced the first nuclear bomb. Some experts were of the opinion that Iraq could have developed a nuclear bomb by the end of 1981, while some other experts estimated it to take between two and ten years.[88]

C. THE EXISTING SAFEGUARDS FOR THE IRAQI REACTOR

The existing safeguards for the Iraqi reactor were ineffective, and Iraq could have produced weapons-grade material in a manner unobservable by the IAEA inspectors. Mr. Richter[89] testified that, from

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[85]N.Y. Times, Mar. 18, 1981, at A3. Senator Cranston accused Iraq of blackmailing oil-dependent Western European nations in order to acquire nuclear technology and fuel. The Senator asserted that Iraq had "used its position as a major oil exporter to attain large stockpiles of uranium from Portugal." *Id.*

[86]*Id.* On March 18, 1981, Richard Burt, then National Security correspondent for the *New York Times* and currently director of the State Department's Bureau of Politico-Military Affairs, reported: "Italy has provided Iraq with sensitive equipment that American officials said could be used to manufacture weapons-grade plutonium . . . officials said that the Administration was most concerned about a decision by Italy to permit Iraq to purchase a sensitive nuclear facility known as the 'hot cell.'" Letter, *supra* note 70, at 81.

[87]*See id.* Trudy Rubin, Professor of Physic and the former Director, Energy and Environment Policy Center at Harvard University, said: "One conclusion stands out: Iraq gave every appearance of being interested in eventually obtaining nuclear weapons." Professor Rubin added: "There are numerous signs that Iraq wanted the bomb" and "the Iraqis had begun to collect those parts of the equipment, fuel and technology necessary to make a bomb that were not subject to international safeguards." Christian Science Monitor, June 24, 1981, at 12.

[88]*See, e.g., id;* Letter, *supra* note 70, at 81.

[89]Roger Richter was employed by the U.S. Atomic Energy Commission and Department of Energy from 1968 until 1978. In 1978, he joined the International Atomic Energy Agency and initially served as an inspector in the Euratom section. Then he became an active inspector in the south and southeast section for two years. On June 16, 1981, he resigned from the staff of the International Atomic Energy Agency in order to testify on IAEA deficiencies and the ineffectiveness of the safeguards system. Hearings, *supra* note 66, at 108.

1976 onward, inspections were performed in Iraq by Soviet and Hungarian nationals.[90] He added that "recently, a French national was granted approval by Iraq to be an inspector, but he has not, as of yet, been to Iraq to make an inspection."[91]

Before any inspection, several weeks notice is given to the inspected country; in the case of Iraq, the inspector must further obtain a visa.[92] Mr. Richter mentioned that not all the Iraqi nuclear installations are under safeguards. Some major facilities, such as the "hot cell" provided by Italy,[93] the radiochemistry laboratory, and others, are not included in any safeguard sytem.[94] Mr. Richter added that the role of the inspector was limited to verifying materials declared for inspection by Iraq or France. "The IAEA does not look for clandestine operations."[95] This fact is very disturbing because Iraq could have produced plutonium in the unsafeguarded "hot cells."[96]

Under the agreement between the IAEA and Iraq, there were only three inspections allowed per year, far from enough to insure compliance with agency guidelines.[97] No use of television or photographic surveillance was to be made.[98] Between inspections, the amount of material removed and the nature of the material could not have been ascertained. Thus, reports to the IAEA after inspections

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[90]*Id.* at 109.

[91]*Id.* The concerned countries have the right to refuse to accept specific inspectors, "a right which they regularly exercise" *Id.*

[92]The government may ask the inspector to postone the date for the inspection, "naturally, not wanting to create unnecessary friction, you will agree." *Id.*

[93]*See, supra.* note 86.

[94]Mr. Richter stated: "So long as Iraq maintains that it is not processing plutonium or fabricating uranium feel in these facilities, they will remain outside of safeguards." *Id.* at 110. Natural uranium, commonly known as yellowcake, is not subject to safeguards "despite its potential for easy conversion to target specimens for plutonium production." *Id.*

[95]*Id.* In the case of the Iraqi reactor, the inspector can very easily realize that 100 tons of uranium in the form of yellowcake is not on the list for inspection, although Portugal reported the shipment of this material to the IAEA. "The 200,000 pounds of yellowcake is not subject to safeguards." *Id.*

[96]Mr. Richter emphasized that the Italian equipment vested in Iraq the capability to convert, in a rather simple fashion, the yellowcake to UO_2 (uranium dioxide—generally used for nuclear fuel fabrication) or, preferably, to uranium metal. This material, under certain process, would be partially converted into plutonium, in the unsafeguarded "hot cells." *Id.*

[97]*Id.* at 111. Mr. Richter mentioned that, "since the entire reactor can be emptied of the clandestine uranium target specimen within days, you, as an inspector, face the fact that by the time you arrive to verify the declared inventory of fuel elements which power the reactor, *all evidence of illicit irradiation could be covered up.*" *Id.* (emphasis added).

[98]In Richeter's opinion, "such surveillance could possibly provide an indication of accelerated withdrawal of specimen from the reactor prior to inspection." *Id.*

might have disclosed no discrepancies between the operator's records and those of the agency. Moreover, even an accurate assessment would have been misleading.[99] Because IAEA safeguards are focused on nuclear fuel and not facilities "under the present international rules, nations can possess [both] nuclear explosive materials [and facilities] without violating . . . the NPT-IAEA safeguards."[100] Indeed, even in one case in which inspection was allowed, it was reportedly conducted in darkness.[101]

In November 1980, Iraq notified the IAEA that, due to the war with Iran, it would be unable to accept IAEA inspectors. Furthermore, the French nuclear technicians working on the reactor were denied access to the facilities.[102] This unilateral action on the part of Iraq could have been repeated in the future when even larger quantities of weapons-grade material might have been in the possession of the Iraqis.

In addition to the inadequacy of safeguards, it should be remembered that Iraq could have withdrawn from the Nuclear Non-Proliferation Treaty after giving three months notice. Furthermore, Iraq could have abrogated its safeguard agreement with the IAEA without fear of sanction. Moreover, there is no effective international response to a non-proliferation violation, even if such violation is detected by the IAEA. In an official document of the IAEA, one finds this comment: "History has shown that the extent to which international bodies can impose fully effective sanctions on national government is limited."[103] The IAEA does not possess any

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[99]Mr. Richter determined: "The difficult part of the job is that you must prepare yourself mentally to ignore the many signs that may indicate the presence of clandestine activities going on in the facilities adjacent to the reactor, facilities which you were not permitted to inspect. . . . Filling in the blanks, you will try to forget that you have just been party to a very misleading process." *Id.* at 112-13. Based on these inadequacies, Richter wrote a report to the U.S. Mission to the IAEA, outlining his concerns about the Iraqi's reactor. In his letter, Mr. Richter emphasized that the IAEA would be unable to detect a diversion of plutonium under the current safeguards arrangements. *Id.* at 119. Mr. Richter added: "But more important than that, I become very much disturbed that the International Atomic Energy Agency was possibly going to be used as a scapegoat for the moral responsibility which several nation seems to have abrogated in the conduct of their technological dealings with this Iraqi sale. *Id.* He continued: "*Iraq is the only situation where an NPT [nuclear nonproliferation treaty] country appeared to be embarking upon a program that was going to produce clandestine material. . . This is the only case we have, where an NPT country . . . gives us cause for great worry.*" *Id.* at 151 (emphasis added).

[100]Hearings, *supra* note 66 (Senator Cranston's statement of June 18, 1981). The inspectors were limited in their visual inspection of the fuel. Several fuel elements could not be verified because they were said to be locked in a vault and the key could not reportedly be located at the time.

[102]Facts on File, 40 World News Digest 864 (1980).

[103]A Short History of Non-Proliferation, Vienna, IAEA (Feb. 1976).

enforcement powers. The immediate halt of nuclear fuel supplies can only serve as a limited measure because Iraq might have already had at its disposal sufficient quantities of material for its nuclear weapons program.

Thus, it is clear that the international system of inspections and safeguards to stop Iraq from acquiring nuclear weapons was incapable of revealing violations of the Treaty and the clandestine development of nuclear weapons.[104]

D. THE DIPLOMATIC EFFORT

Beginning in 1975, Israel conducted diplomacy with various governments and international bodies to stop the dangerous progress towards fabrication of nuclear weapons by one of the most radical countries in the region. Those efforts failed, and the Iraqi nuclear program remained in continuous development without any disturbance. The use of coercion in this case was clearly the last resort under any objective test.

Perhaps the best evidence of the thoroughness of the diplomatic effort is supplied by the Iraqis themselves. On October 4, 1980, an official Iraqi newspaper, noting that "the one who fears the Iraqi nuclear reactors is the Zionist entity," concluded, "*This entity has raised heaven and hell against Iraqi attempts to acquire nuclear technology* and it has threatened that it will not stand with hand tied towards that."[105]

The diplomatic efforts included numerous meetings with senior officials of the French government including its president, prime

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[104]The Mallisons argued that the safegurads were adequate. Mallison & Mallison, *supra* note 2, at 438-39. The weakness of their argument is in their reliance on French, Italian, and IAEA sources. In fact, France, Italy, and the IAEA are not objective bodies in this case since they have to justify their policy in dealing with the Iraqi nuclear program. It would be ludicrous to expect them to admit that the Iraqis were looking for nuclear weapons and that they had no effective means to stop them. Professor Norton Moore rightly stated: "I believe the French decision in agreeing to built Osirak given the instability of the Middle East and the ambiguity surrounding Iraqi long term intentions was irresponsible in the extreme and shares substantial blame for the Osirak incident." Hearings, *supra* note 66, at 248. It seems that the same can be said about the Italian government.

[105]Al-Jumhuriyah—Baghdad (emphasis added).

minister, and foreign minister.[106] After almost two years of intensive discussions with the French government, Israel expanded diplomatic efforts to the United States during the first half of 1976. Israel asked the United States government to take all possible steps to prevent the implementation of the French-Iraqi agreement. The United States, sharing the same concern about the Iraqi nuclear program, approached the government of France for clarification.[107]

On March 30 and 31, 1977, during the visit of the French foreign minister to Israel, the Israeli foreign minister, Yigal Allon, again expressed Israel's alarm at the supply to Iraq alone of 93%-enriched weapons-grade uranium.[108] In January 1979, the Israeli foreign minister, the late Moshe Dayan, visited Paris and discussed Irasel's growing concerns with Mr. Raymond Barre, then prime minister of France.[109]

In the summer and fall of 1980, high level contacts were maintained again between the governments of Israel and the United States concerning Iraq's nuclear capability and intentions.[110] In

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[106]In April 1975, during a visit to Paris of the Israeli Deputy Prime Minister and Foreign Minister, the late Yigal Allon, the threat to Israel as a result of the French-Iraqi nuclear cooperation, was discussed. Mr. Allon expressed Israel's growing apprehension at the possibility of the misuse of nuclear technology and materials by Iraq. Israel Document, *supra* note 67, at 30.

After the conclusion of the agreement for nuclear cooperation between France and Iraq, on November 18, 197, the French Ambassador to Israel was asked for clarification of the nuclear relationship between Iraq and France. His response was: "The sale of an Osiris-type reactor to Iraq is under consideration." *Id.*

On January 27, 1976, after a discussion in the Knesset (Israel's Parliament) of the acquisition of a French nuclear reactor by Iraq and the nuclear threat, Mr. Allon asked the French Ambassador to convey to his government the Knesset's concern. Mr. Allon added: "The furnishing of nuclear capabilities to irresponsible states in the Middle East is a dangerous act. *Id.* at 31. *See also* Miami Herald, July 23, 1980.

[107]The London Times, July 4, 1978, reported on U.S. efforts to exert pressure on France to withhold a planned delivery of weapons-grade uranium to Iraq. According to that paper: "The State Department, at the instigation of President Carter, has held talks with France during which the United States expressed its 'grave concern' that the Iraqis could use the uranium to manufacture nuclear weapons".

[108]The French Foreign Minister, Louis de Guiringaud, expressed his belief in this meeting that sufficient safeguards existed. Furthermore, he added that France was engaged in technological development which would enable fueling of the Osiris reactor with uranium enriched to no more than 20%. Israeli Document, *supra* note 67, at 31.

[109]According to the Sunday Times of London, Oct. 26, 1980, the French prime minister, Barre, met with Iraqi leaders to convince them to accept "carmel." *See supra* note 82. Iraq adamantly refused anything but the 93% enriched uranium. Under threats of an oil cut-off and cancellation of French arms purchases, France agreed to Iraq's demands.

[110]In February 1980, in response to reports of the French failure to persuade the Iraqis, Senators Frank Church, then Chairman of the Foreign Relations Committee, and Jacob Javits, sent an expression of concer to President Carter. Congressional Research Study, June 8, 1981.

March 1980, it was reported that administration officials were "most concerned" about an Italian decision to permit Iraq to purchase a sensitive nuclear facility called a "hot cell," which would enable Iraq to extract plutonium from other nuclear substances.[111]

In July 1980, other contacts with French officials were made without any change in the French position.[112] In the summer of 1980, during a visit to Rome, Israeli foreign minister Yitzhak Shamir expressed Israel's deepest concern that Iraq had been given a massive capability. On September 26, 1980, a few days after Iraq invaded Iran, Mr. Shamir met his Italian counterpart in New York and raised again the problem of nuclear cooperation between Italy and Iraq.[113] On the same day, Mr. Shamir also met the French foreign minister and argued that the evacuation of French technicians from the Iraqi reactor proved that France could not effectively control and supervise Iraq's nuclear activities. On October 4, 1980, Mr. Shamir discussed the issue with President Giscard d' Estaing of France, and, on January 15, 1981, Shimon Peres, the Israeli opposition leader, presented the same matter to the French president.[114]

In its efforts to use any peaceful means to stop the Iraqis from developing nuclear bombs, Israel tried to interest newspapers, magazines, and television networks in the issue.[115]

Finally, it is significant to mention President Reagan's report on this matter: "Iraq's nuclear program has been moving very rapidly, and both the speed and the breadth of the program as well as its inclusion of weapons—usable materials, has prompted concern now heightened by the Iran-Iraq war."[116]

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[111]N.Y. Times, Mar. 18, 1980. The correspondent, Richard Burt added that efforts by U.S. officials have "so far" succeeded in persuading Italy to reassess the project.

[112]*See, e.g.*, Christian Science Monitor, Aug. 18, 1980; Wash. Post, July 30, 1980. The Washington Post correspondent, Donald Koven, mentioned that "Israel has been mounting an increasingly insistent campaign to underscore the danger that Iraq could develop atomic weapons as a result of French actions" and that "Washington also has privately expressed its concern to France about the wisdom of shipping sensitive materials to unstable regimes."

[113]Israeli Document, *supra* note 67, at 33. Mr. Shamir pointed out at this meeting that the events in the Gulf urgently indicated the aggressive intentions of Iraq's leaders.

[114]*Id.* at 34.

[115]N.Y. Times, June 14, 1981. The correspondent, David Shipler, added: "Prime Minister Begin activated a campaign of secret diplomacy that included personal letters to the French and other European heads of state to persuade them to cut off support for the project".

[116]U.S. Arms Control and Disarmament Agency, 1980 Annual Report, (transmitted to the United State Congress on Apr. 8, 1981).

There can be no doubt as to the concerted diplomatic efforts and other peaceful activities which Israel undertook from 1975 onward to prevent the aid to the Iraqi military nuclear program. Only after thoroughly but unsuccessfully exhausting those diplomatic channels did Israel resort to military force against the Iraqi reactor.[117]

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[117]The Mallisons, in dealing with "the requirement of peaceful procedures" concluded that "[i]t is clear that [Israel] undertook, at most, very limited peaceful procedures or diplomatic measures to deal with the threat." Mallison & Mallison, *supra* note 2, at 427-28. Ignoring all the facts which were detailed above, they stated: "There is no evidence of direct or indirect diplomatic contacts with Iraq." Although it is factually true that Israel did not approach Iraq with the issue, it is fallacious to suggest that Israel should have been expected to or could practically approach a government which uniformly and stridently refused all contacts with the "Zionist entity."

Another argument raised by the Mallisons is that "[i]n the circumstances claimed by Israel, it had ample time to present a complaint to the security council. . . ." *Id.* at 428. The same argument has been raised by Wright dealing with the Cuban Missile Crisis. Wright, *supra* note 47, at 563. He determined that the United States acted unlawfully by not submitting the missile threat to the United Nations before taking unilateral action. The answer to this argument was that any resort to the Security Council would be futile, bearing in mind the veto right of the Soviet Union. MacChesney, in replying to Wright's argument, stated further: "It is not enough to suggest that a preliminary resort to the United Nations was a prerequisite. . . . A threatened state must retain some discretion in its individual judgment of necessity. . . ." MacChesney, *supra* note 47 at 592.

In the Israeli case, the argument requiring a resort to the United Nations is much weaker. The political structure of the Security Council is well known and there is no real possibility of imposing sanctions on Iraq or even condemning its actions. Furthermore, Professor Moore explained that, in his view, even "if Iraq were suddenly one day to announce to the world that it had three nuclear weapon or a number of nuclear weapons, *it is unlikely there would be any international sanctions taken . . . it is particularly unlikely in the context of the Security Council which, frankly, since about 1953, as I have indicated, has had a Soviet Veto available to essentially the view reflected by the Iraqi position.*" Hearings, *supra* note 68, at 253 (emphasis added).

Another means of peaceful procedure suggested by the Mallisons was that "[a] genuine concern about the adequacy of International Atomic Energy Agency inspection procedure could be addressed to the IAEA. . . ." Mallison & Mallison, *supra* note 2, at 428. The Israeli diplomatic efforts were concentrated towards the program of nuclear cooperation between Iraq, France, and Italy. Safeguards could not prevent Iraq from acquiring nuclear weapon and this situation could not be changed without modification of the treaty itself and especially the safeguards agreement between Iraq and the IAEA and between Iraq and France. Any change in both documents would have had to have been agreed to by Iraq.

The Mallisons determined: "In the event of evidence of Iraqi violation of its obligation under the NPT, this could be a matter for the world community including the state-parties to the NPT to deal with and a matter for unilateral state action". Unfortunately, they declined to explain how the "world community" would deal with a violation of the treaty by Iraq and what kind of sanctions against this country are really available. Mallison & Mallison, *supra* note 2, at 428.

E. THE ISRAELI RAID AND THE RIGHT OF SELF-DEFENSE

The Israeli action was not a result of an arbitrary decision, but instead was reasonable under the particular circumstances and was legal under the current rules of self-defense in international law. The Israeli action fulfilled the requirements of necessity and proportionality as well.

1. Characteristics of the Participants

The nature and history of the Iraqi regime has been discussed in detail. The commitment of Iraq to the destruction of the Israel has been fully explained. Yet to be discussed is the effect of the Iraqi refusal to sign any armistice or cease-fire agreement with Israel[118] which some have argued had justified action against Iraqi military targets,[119] although others have characterized that factor as irrelevant.[120] Neither of these views is entirely correct. Although the continuous state of war between Iraq and Israel cannot alone justify armed attack against Iraq, the Iraqi proclamations nevertheless point out the real character and intention of the Iraqi regime.[121] As was explained by Professor John Norton Moore, not only were the

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[118]On Oct. 22, 1973 the Iraqi government made the following statement: "Iraq does not consider itself a party to any resolution, procedure or measure in armistice or cease-fire agreements or negotiations for peace with Israel, now or in the future." Hearings, *supra* note 68, at 80.

[119]*See, e.g.*, Hearings, *supra* note 68, at 36-37 (letter by Hon. Arthur Goldberg to the Senate Committee of Foreign Relations). In his letter, Ambassador Goldberg stated:

> In light of the facts that by its own decision Iraq deems to be at war with Israel, the state of Israel under established rules of international law, has the right to take military action, including bombing, against installations in Iraq which potentially may assist Iraq in its proclaimed war-like designs. . . . It is my convinction, therefore that the criticism of Israel for the bombing of the Iraqi nuclear installation has overlooked the basic fact that Iraq, by its own choice, is in state of war with Israel and that Israel, therefore, had the legal right to seek to destroy such an installation.

[120]*See, e.g.*, Mallison & Mallison, *supra* note 2, at 433. In their opinion, there is no significance to the claimed "state of war" because this "concept is not recognized in the United Nations Charter and, consequently, cannot prevail over the limitation of the Charter."

[121]The claims of a continuing state of belligerency against Israel is in violation of the United Nations Charter and Resolutions 242 and 338 of the Security Council. *See* Hearings, *supra* note 68, at 247 (testimony of Prof. Moore). Moreover, the Iraqi threat to eliminate Israel is in violation of Article 2(4) of the U.N. Charter which prohibits "threat or use of force against the territorial integrity or political independence of any state. . . ."

threats to eliminate Israel in violation of the United Nations Charter, but also: "Iraqi support for terrorist actions against Israel are in violation of international law."[122]

The other participant in the conflict was Israel, a small country with a population of 4 million, which includes 600,000 citizens who are not Jews. The Jewish community in Palestine accepted the United Nations Resolution of November 29, 1947, which partitioned Palestine into Jewish and Arab states. This resolution has been totally rejected by the Arab countries. After the proclamation of the state of Israel, the neighboring Arab countries, including Iraq, invaded Israel with one purpose in mind, the annihilation of the Jewish state. Israel and Iraq share no common border, and Iraq has never claimed that Israel threatens its independence, territorial integrity, or its very existence. The Iraqi armed forces were not designed to defend Iraq against Israeli attack but to participate in "the liberation of Palestine."[123] Israel has consistently declared its willingness to solve the Israeli-Arab conflict by negotiation and other peaceful means. The peace agreement with Egypt proves that Israel is ready to make

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[122]U.N. Charter art. 2(4).

[123]Iraqi President Hussein declared in August 1980: "We are also preparing ourselves for a role in liberating the beloved land of Palestine," *quoted in Hearings, supra* note 68, at 83.

painful sacrifices towards this goal. The Israel Defense Forces exist for only one purpose—to defend and secure the very existence of the state.[124]

2. Objective of the Claimants

As was noted above, the objective of the Israeli action was to eliminate the nuclear danger to Israel and to defend its physical existence. Indirectly, the Israeli raid alerted the international community to the danger of supplying advanced nuclear equipment to unstable and irresponsible countries. Furthermore, the impotence of the IAEA safeguards was revealed and the prospect loomed of changes in the system designed to exercise greater control over such countries as Iraq.

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[124]Dealing with the participants in the Israeli operation, the Mallisons determined that "Israel has a substantial nuclear program" and that "Israel is the state with the greatest nuclear weapons potential in the region." Mallison & Mallison, *supra* note 2, at 425. In his testimony before the Senate Committee on Foreign Relations, Professor Mallison stated: "Even if we assume that Iraq like Israel, has a military weapons program, this, without more, would not justify an Israeli attack upon Iraq, or vice versa, an Iraqi attack." Hearings, *supra* note 72, at 253.

Assuming, *arguenda*, that Israel has been engaged in a military nuclear program of its own, there is justification for an Israeli demand to prevent Iraq from acquiring the same capability. The same agrument has been raised by some commentators dealing with the Cuban missile crisis. *See generally* Wright, *supra* note 47 at 550. The argument is based on the similarity between the U.S. missiles deployed at the time in Turkey and in other NATO countries near the Soviet Union, and the Soviet missiles in Cuba. Wright explains that Khrushchev and Castro could have justified the deployment of offensive nuclear missiles by saying that the deterrent influence of medium-range missiles was the only feasible defense against the overwhelming power of the United States. Wright continued: "Khruschev and Cstro could defend this opinion by citing the American establishment of medium-range missile bases in Turkey and other countries near the Soviet Union to deter the latter from invading them." *Id.*

In his statement before the U.N. Security Council on October 23, 1962, Ambassador Adlai Stevenson said that the argument equating Soviet bases in Cuba with NATO bases near the Soviet Union was invalid because of the "sudden and drastic" character of the Soviet actions imperiling "the security of all mankind," and because the purposes were different. Wright, *supra* note 47, at 550.

Fenwick, *supra* note 50, at 590, asked and answered the same question: "Could the same he said of the bases in Turkey, which more than one writer has brought forward in a parallel case? The answer is, except for those of Marxist-Leninist sympathiers, that the whole conduct of the United States over the past fifteen years gives no suggestion of aggressive, as the overwhelming majority of the international community would testify."

Exactly the same could be said in the Israeli case. The difference in this case is between a state which requires arms to defend itself against more than twenty Arab countries and Iraq, a self-admitted enemy of Israel which has openly expressed its desire to destroy and eliminate the Jewish state. The difference is between a democracy and humane society and Iraq, in which an unreliable and unstable regime exists. The difference is between a country seeking for a peaceful solution for its conflicts and Iraq, in which exists an aggressive and ambitious regime with aspirations to rule the Persian Gulf as well as to rule the Arab world.

In contrast, the Iraqi objective was unlawful—secret acquisition of nuclear weapons to be used against another sovereign independent state. Iraq's objective was directed against world order and included grave violations of the U.N. Charter and the international law. The Iraqi objective was far from "asserting its own right to national security—including freedom from aggression and coercion."[125] In describing the Iraqi violations of international law, Professor Moore rightly concluded that "[i]t would seem that Iraq shares substantial responsibility for the overall climate that produced it [the Israeli raid]."[126]

3. Conditions and the Expectation of Necessity

The conditions under which Israel claimed the right of self-defense were discussed while dealing with the threat of the Iraqi nuclear reactor. The degree of necessity to react forcibly was very high, considering the aggressive chracter of the Iraqi regime, its commitment to the destruction of Israel, its clear intention to develop nuclear weapons in the near future, and the expectation that the international community would not or could not stop Iraq before it acquired the bomb.

One of the most important considerations in appraising the degree of necessity is not only the threat itself but the imminence of the danger. One may argue that the threat to Israel was not imminent since Iraq could develop nuclear weapons, if at all, "over the next several years."[127]

It would be correct to say that, even if Iraq could have produced plutonium or other weapons-grade materials by the end of 1981,[128] *The Caroline* requirements were not met. However, those requirements—that the necessity for force be instant and overwhelming,

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[125]Mallison & Mallison, *supra* note 2, at 426.

[126]Hearings, *supra* note 72, at 243.

[127]Mallison & Mallison, *supra* note 2, at 426.

[128]*Id.* at 430. It must be noted that the experts differed on how long it would have taken to produce plutonium from spent uranium fuel in order to make a bomb. Some of them estimated the required period of time in six weeks. Prof. Yuval Neeman, former scientific director of the Israeli Atomic Energy Commission, *quoted by* Trudy Rubin in Christian Science Monitor, June 24, 1981 at 12. Others assumed that Iraq would have been able to produce weapons-grade materials by the end of 1981. Senator Alan Cranston, *quoated in* N.Y. Times, June 9, 1981 ("a pre-emptive strike is defensive" because Iraq "could have provided a weapon by *Oct. 1st and if not then, certainly by the end of the year*" (emphasis supplied)). Truby Rubin noted: "Estimates [concerning the ability to produce plutonium] range from 2 to 10 years." Christian Science Monitor, June 24, 1981, at 12.

leaving no choice of means[129] and no moment for deliberation—are too restrictive in the nuclear era and are wholly unrealistic when applied to nations.

It can be argued, however, that the danger was not imminent under any other standard. This argument would be persuasive, except in light of one additional factor, the date on which the reactor would become operational. Apparently, the Israeli decision was the first time in which any government found itself bound to act earlier in consideration of humanitarian factors that would have made a later attack, while perhaps more palatable to some critics, clearly inhumane and unlawful.[130] According to "highly reliable sources," the Israeli government understood that the reactor would have been in operation at the beginning of July or September 1981[131] and that to destroy the reactor after that date would have resulted in the death and injury of thousands of innocent people. Since the diplomatic avenues were completely exhausted and there were no means to eliminate the danger other than the military option, it was lawful to

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[129]The fact that the attack was planned in principle several months before June 1981, *see* Russell, *Attack—and Fallout*, The Times Magazine, June 22, 1981, at 27, about the military preparations, and that the Israeli pilots practiced their bombing runs prior to the incident does not mean that Israel did not intend to exhaust all available peaceful means. Military forces must be ready for action at any time and it is the decision whether to use force or not, and the timing of the action, itself, that impacts on whether a nation has attempted to exhaust other remedies in good faith. The government of Israel had to consider the military option, in case of failure of the diplomatic efforts, for a long period of time before the attack. A parallel can be drawn with the military planning that went on for sometime before the abortive American rescue attempt was made in Iran, while extensive diplomatic efforts were undertaken by the Carter Administration to free American diplomats held hostage in Iran in 1979 and 1980.

[130]The Israeli official statement on this issue reads as follows: "Highly reliable sources gave us two dates for the completion of the reactor and its operation. The first, the beginning of July 1981. The second, the beginning of September [1981]. Within short time, the Iraqi reactor would have been in operation and hot. In such conditions, no Israeli Government could have decided to blow it up. This would have caused a huge waive of radioactivity over the city of Baghdad and its innocent citizens would have been harmed." N.Y. Times, June 9, 1981.

[131]The Mallisons cited "French nuclear experts" to conclude that the reactor would not have become critical until the end of 1981. Mallison & Mallison, *supra* note 2, at 431. In this case, French sources cannot be considered objective and should not be relied upon against an official governmental statement especially where the "French nuclear experts" remain anonymous. Although there is no reason to doubt the veracity of the official Israeli statement, it is corroborated by *Attack—and Fallout*, The Times Magazine, June 22, 1981, at 26, in which George Russell related: "At roughly the same time [May 22, 1981], Begin's office *received two additional intelligence reports* that the Iraqis were prepared to activate the reactor (make it "hot" in technical jargon) *as early as the first week in July [1981].*" In contrast to the opinion of the "French nuclear experts," the French Foreign Minister said: "The damage was centered on the larger power reactor due to become operational *this summer.*" (Wash. Post June 9, 1981, at A1) (emphasis added).

act a short time before the activation of the reactor. The government of Israel thus had considered not only Israeli defense needs but also the terrible consequences to Iraqi civilians of an attack on an operative reactor.

Professor Moore has noted that the effort to strike the reactor before it went critical must also be taken into consideration and, even if it were two to five years before the Iraqis could produce a bomb: "*Then I think that the action might well be legal.*"[132] The precondition for this significant determination is "that there were no other effective international or diplomatic non-use of force options available to Israel in this period." As has been shown, there were no peaceful diplomatic means available to Israel. Thus, it may be concluded that the requirement of "necessity" had been met.[133]

4. The Requirement of Proportionality

The requirement of "proportionality" is, like the requirement of "necessity," a prerequisite for characterizing coercion as lawful self-defense. The quantum of the responding coercion must be reasonably related or comparable to the quantum of the initiating coercion. In other words, it is "the requirement that the use of force or coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."[134]

The danger in this case was the use of nuclear weapons against Israel in the near future, an act capable of causing a total destruction of the nation. As was indicated by Professor Moore: "The small size and economic base of Israel may make it particularly vulnerable to a nuclear first strike even by a few crude weapons—it is not clear that a second strike deterrent is politically, economically or militarily feasible for Israel."[135]

After exhausting all peaceful means, the Israeli Air Force destroyed the nuclear reactor in a surgical raid. This preemptive strike lasted two minutes.[136] Although the raid was certainly a use of force, it was not directed against Iraq's territorial integrity or

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[132]Hearings, *supra* note 66, at 251 (testimony of Prof. Moore) (emphasis added).

[133]As to the argument that Israel could approach the new government in France which was considered to be more friendly to Israel, *see Hearings*, *supra* note 72, at 83, it was mentioned in Letter, *supra* note 70, that the new French government announced that there will be no changes in its policy towards Iraq.

[134]McDougal & Feliciano, *supra* note 9, at 242.

[135]Hearings, *supra* note 66, at 247 (testimony of Prof. Moore).

[136]*2-Minute Raid*, Wash. Post, June 10, 1981 at A1.

political independence. While loss of life, however minimal, is always regrettable, Israel chose the date for the operation considering the absence of the French technicians from the reactor during the Christian day of rest, Sunday. This air strike was the least measure of coercion available under the circumstances.

VII. CONCLUSION

The Israeli raid against the Iraqi nuclear reactor near Baghdad was and still is a controversial issue. It was the first use of military force against a nuclear installation. Although this case is unique among cses in which states have invoked the right of self-defense, careful and thorough examination of the law which has developed from these cases applied to the facts of this extraordinary event demonstrates that the requirements for self-defense were met by Israel. The operation was necessary and proportionate to the threat and the raid was most reasonable under the circumstances. Israel relied on the traditional right of self-defense which is still available to all the nations in the world. Despite the seemingly restrictive wording of Article 51 of the United Nations Charter, customary international law secures to any country the right to use force to prevent imminent armed attack in the exercise of anticipatory self-defense.

Unfortunately, the organized international community, and especially the United Nations, lacks the means or the willingness to address palpable threats by one nation to use force against another. Iraq has declared openly and expressly for more than 33 years its intentions to eliminate the state of Israel. Yet, no nation or organization has imposed sanctions on Iraq or even condemned this violation of the spirit of the United Nations Charter. Given this state of affairs, Israel would have waited in vain if it had foreclosed military action in favor of obtaining help from the international community.

Perhaps one of the most important lessons of this case is that the utmost must be done to prevent the transport or sale of nuclear technology, which can be used to produce bombs, to unstable, radical, or totalitarian regimes. Western governments which are ready, for commercial reasons, to ignore the dangers of technology transfers of this nature must consider the instability that they introduce into world order by suppling the means to develop nuclear weapons to countries like Iraq. All nuclear nations, regardless of political and other concerns, should understand that nations facing a nuclear threat can act under international law to remove such threats to national survival.

BOOK REVIEWS

ADMINISTRATIVE RULEMAKING and FEDERAL AGENCY RULEMAKING*

James T. O'Reilly, *Administrative Rulemaking: Structuring, Opposing, and Defending Federal Agency Regulations.* Colorado Springs, Colorado: Shepard's/McGraw-Hill (Regulatory Manual Series), 1983. Pages: xv, 480. Introduction, Appendices, Tables, Index. Price: $70.00. Publisher's address: Shepard's/McGraw-Hill, P.O. Box 1235, Colorado Springs, Colorado 80901.

Office of the Chairman: Administrative Conference of the United States, *A Guide to Federal Agency Rulemaking.* Washington, D.C.: United States Government Printing Office, 1983. Pages: xiv, 309. Foreword, Preface, Appendices. Price: $5.50. Publisher's address: Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402.

*Reviewed by Major Michael P. Cox***

In 1946, the Congress, by a unanimous vote of both houses, enacted the federal Administrative Procedure Act (APA).[1] Since its enactment, the APA's rule-making section has not been amended; notwithstanding, rule-making by federal agencies has evolved substantially in the past four decades. The growth of administrative agencies as a significant "legislator" at the federal level cannot be denied and should not be overlooked. One need only scan the pages of the *Code of Federal Regulations* to confirm the nature and pervasiveness of rules promulgated by federal administrative agencies. As a consequence of this increase in government by regulation, one can only marvel at the lack of specialized texts devoted solely to the subject of agency rule making. Few, if any, exhaustive materials

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*The opinions and conclusions expressed in this book review, and in the books themselves, are those of the authors and do not represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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[1]60 Stat. 237 (1946), *as amended by* 80 Stat. 378 (1966), 81 Stat. 54 (1967), 88 Stat. 1561 (1974), 90 Stat. 1241, 2721 (1976), 92 Stat. 183, 1225 (1978) (codified as amended at 5 U.S.C. §§551-559, 701-706, 3105, 7521, 5362, 3344, 1305).

have been published in this area; rather, rule-making has been generally treated only as one of the many facets of the larger picture of administrative law.[2]

Two books, each exclusively devoted to issues surrounding federal agency rule-making, have been published within the past several years. One is written by a person well-familiar with the "ins-and-outs" of practicing before administrative agencies.[3] The other was produced by the staff[4] of the major federal agency created by the Congress to study "the efficiency, adequacy, and fairness of the administrative procedure used by adminitrative agencies" so as to be able to "make recommendations to administrative agencies, . . . the President, Congress, or the Judicial Conference of the United States."[5] The former was prepared principally for practitioners[6] and the latter for use by federal agencies.[7] One author is James T. O'Reilly; the other is the staff of the Administrative Conference of teh United States (ACUS).[8] The importance of these books, however, transcends their avowed audiences. Each volume should be on the shelves of all persons—practicing attorney or bureaucrat—who find themselves involved with federal administrative law. Access to the volumes is especially important for persons who deal regularly with agency rule making.

The books share a number of common features:

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[2]*See, e.g.*, K. Davis, 1 Administrative Law Treatise §§6:1-6:39 (2d ed. 1978); B. Mezines, J. Stein, & J. Gruff, 3 Administrative Law §§13.01-18.01 (1984); L. Modjeska, Administrative Law: Practice and Procedure §§1.7, 1.8, 4.2-4.9, 5.3, 5.8, 6.14 (1982); B. Schwartz, Administrative Law §§4.1-4.17 (2d ed. 1984).

[3]The author of *Administrative Rulemaking: Structuring, Opposing, and Defending Federal Agency Regulations*, James T. O'Reilly, not only is a full-time corporate attorney in a major corporation, but also teaches administrative law, writes numerous texts and articles, and provides advice as a consultant to other practicing attorneys, to administrative agencies, and to Congressional bodies.

[4]The "Chairman's Foreword" to *A Guide to Federal Agency Rulemaking* clearly states that "the views expressed in the Guide are those of my office and do not necessarily represent the views of the Administrative Conference membership." *Id.* at ix. *See infra* note 8.

[5]U.S.C. §574(1) (1982).

[6]J. O'Reilly, Administrative Rulemaking: Structuring, Opposing, and Defending Federal Agency Regulations v-vii (1983) [hereinafter cited as O'Reilly]. For a discussion of Mr. O'Reilly's book by a practicing attorney, *see* Book Review, *Administrative Rulemaking: Structuring, Opposing and Defending Federal Agency Regulations*, 36 Ad. L. Rev. 85-89 (1984).

[7]Office of the Chairman: Administrative Conference of the United States, A Guide to Federal Agency Rulemaking xi-xiii (1983) [hereinafter cited as ACUS].

[8]The Administrative Conference of the United States was established in 1964 by the Administrative Conference Act, 80 Stat. 388 (codified as 5 U.S.C. §§571-576 (1982)). The Recommendations and Statements of the Administrative Conference can be found at 1 C.F.R. pts. 305, 310 (1982).

A. ORGANIZATION

O'Reilly and ACUS are generally organized in a time-line order; that is, each progresses through the rule-making process from the idea stage, to notice requirements, to the comment period, to the final rule, and, finally, to judicial review of rules. Other topics, such as the rule-making record, "ex parte" communications, public intervention and participation, regulatory flexibility and analysis, and the like, are inserted and discussed as appropriate within this conceptual framework. Although the arrangement is logical and should be easy to follow for most readers, a person without a basic knowledge of the adminsitrative rule-making process might be initially overwhelmed by the material. What would have been quite helpful is inclusion at the beginning of each volume of a one or two page summary of the rule-making process, either in text or in a diagram. Each reader, whether an administrative law expert of a person new to the area, would have then been able to visualize at the outset "How Rules Are Made" and in what order the material is presented. In this regard, O'Reilly does contain a detailed Index (10 pages), as well as a Table of Cases and a Table of Statutes, none of which are in ACUS, which permit the reader to identify quickly at what page(s) discussion of indexed topics, particular cases, and specific statutes are located. A user of ACUS must depend solely upon the Table of Contents for access to the book's information.

B. APPENDICES

The Appendices of both volumes contain material that is predictable and appropriate. For example, not only are relevant sections of the APA[9] presented, but also recent statutory[10] and executive requirements[11] relating to regulatory flexibility and analysis are setout. Each book, however, presents useful information not found in the other. ACUS has an extensive rule-making bibliography of articles, books, cases, and miscellaneous sources.[12] O'Reilly, on the other hand, has included the text of the Paperwork Reduction Act[13] and a copy of the Senate-passed (March 1982) Regulatory Reform

[9]O'Reilly, unlike ACUS, provides full text of all "Administrative Procedure," as well as "Judicial Review," sections of the Act (5 U.S.C. §§551-559, §§701-706). *See* O'Reilly, supra note 6, at App. I; ACUS, *supra* note 7, at App. B.

[10]The Regulatory Flexibility Act, 5 U.S.C. §§601-612 (1982). *See* O'Reilly, *supra* note 6, at App. III; ACUS, *supra* note 7, at App. B.

[11]Exec. Order No. 12,291 (Feb. 17, 1981), 1 C.F.R. §127. *See* O'Reilly, *supra* note 6, at App. IV; ACUS, *supra* note 7, at App. C.

[12]*See* "Selected Bibliography," ACUS, *supra* note 7, at App. A.

[13]Paperwork Reduction Act, 44 U.S.C. §§3501-3519 (1982), *reprinted in* O'Reilly, *supra* note 6, at App. II.

Act.[14] The Appendices, taken together, provide persons dealing with agency rule making most of the basic source material which is desirable. However, both have omitted one relevant and important reference tool: *The Attorney General's Manual on the Administrative Procedure Act* (1974), a detailed summary of the APA's legislative history prepared by the Justice Department at the direction of Attorney General Tom Clark.[15] Although inclusion of all 139 pages of the Manual would not have been feasible, reproduction of the few sections relating directly to rule-making would have provided relevant legislative background important to interpretation of the APA.[16]

C. VISUAL AIDS

Mr. O'Reilly and the staff of the ACUS have developed a number of diagrams or "flow charts," which assist one in following conceptually various aspects of the rule-making process. The following are illustrative: from O'Reilly, "Rulemaking Stages: Idea Conception to the Comment Stage" (Figure 4-1) and "Pattern of Judicial Review (Where No Special Statutory Procedure Exists)" (Figure 14-1), and from ACUS, "Rulemaking under Executive Order No. 12,291 and Section 553 of the APA" (Appendix E) and "Rulemaking subject to the Paperwork Reduction Act and Section 53 of the APA" (Appendix F). Because the authors have taken time to think through these, as well as other,[17] rule-making issues and have recorded their

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[14]The Regulatory Reform Act. S.1080, *reprinted in O'Reilly, supra* note 6, at App. V.

[15]The importance of the *Manual* has been acknowledged by the United States Supreme Court on a number of occasions. For example, in Steadman v. SEC, 450 U.S. 91, 102-03 n.22 (1981) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 546 (1978)), the Court stated that "some deference [is given to the *Manual*] because of the role played by the Department of Justice in drafting the legislation. . . ." Also of note is that Attorney General Clark subsequently became Justice Clark.

[16]*See, e.g.*, The Attorney General's Manual on the Administrative Procedure Act 12-16 [Section I.C: Distinction between Rule Making and Adjudication], 19-23 [Section II.3(a): Rules], 26-39 [Section III: Rule Making] (1947). Although the *Manual* is out of print, it is reprinted in B. Mezines, J. Stein, & J. Gruff, 1 Administrative Law App. 1C (1984).

[17]O'Reilly, *supra* note 6, contains diagrams at 90, 131, 189, 213, 214, and 284: "Rulemaking Stages: Idea Conception to the Comment Stages" (Fig. 4-11), "Rulemaking Stages: The Comment Stage fo the Final Rule" (Fig. 6-1), "Regulatory Impact Analyais" (Fig. 9-1), "The Paperwork Reduction Act" (Fig. 10-1), "The Environmental Impact Process" (Fig. 10-2), and "Pattern of Judicial Review (Where No Special Statutory Procedure Exists)" (Fig. 14-1). ACUS *supra* note 7, contains three diagrams: "Rulemaking under Section 553 of the APA and the Regulatory Flexibility Act" (App. D), "Rulemaking under Executive Order No. 12,291 and Section 553 of th APA" (App. F), and "Rulemaking subject to the Paperwork Reduction Act and Section 553 of the APA" (App. F).

thoughts in this graphic manner, the reader, especially one not well versed in the intricacies of administrative process, is saved immeasurable time and, most likely, frustration.

Although the books are similar in many ways, a significant difference exists, a difference best explained by designating O'Reilly as a practical treatise on the subject of agency rule-making and identifying ACUS as a "Nutshell"-type of publication.[18] Assignment of these labels is not intended to be a comment on the quality or usefulness of either book; rather, for those persons who have studied law in the United States, the designations are meaningful. Persons writing treatises have the luxury of being able to be more expansive in their discussion; a "Nutshell" volume presents more "black-letter" law with little opportunity for extensive explanation. As a consequence, O'Reilly generally goes into greater depth on the issues discussed and contains more detail on the information presented than does ACUS. The former can be used, therefore, both by persons well-versed in administrative law, as well as by those seeking an introduction into the area or assistance with a particular issue. The latter would seem more appropriate for persons, in this instance, with some working knowledge of agency rule making who might be looking for detailed information or guidance with regard to a specific question. ACUS, however, because of the nature of its author, *i.e.*, the staff of the Administrative Conference of the United States, does contain many useful insights into federal administrative rule making that are quite instructive to both the expert and the not-so-expert.

With the publication of these two volumes, both the practicing attorney and the bureaucrat have at hand resource information of the highest quality. Together, O'Reilly and ACUS present both sides of agency rule-making, the private-sector point of view, as well as the concerns of the rule-makers. No attempt will be made to recommend one over the other. Each commends itself in its own way, but one observation should be made: Neither should be consdiered as a substitute for the other. Both should be on the bookshelf of any person who confronts agency-made rules on a regular basis, either as an opponent or as a proponent.

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[18]The West Publishing Company, St. Paul, Minnesota, publishes a series of paperback books called the "West Nutshell Series." "Nutshells" are used by many persons to study for examinations (law school, state bar, or otherwise) because each book is a concise, summary of a particular area of the law, *e.g.*, E. Gellhorn & B. Boyer, Administrative Law and Process in a Nutshell (2d ed. 1981). The books in the "West Nutshell Series" are also utilized as quick references for basic principles of law.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Miltiary Law Review*.

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Authors or Editors of Publications Noted, and, in Section III, Titles Noted, the number in parenthesis following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

II. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Blackby, Frank, Jozef Goldblat and Sverre Lodgaard, editors, *No First Use* (No. 1).

Broida, Peter B., *A Guide to Merit Systems Protection Board Law and Practice* (No. 2).

Ervin, Sam J., Jr., *Preserving the Constitution: The Autobiography of Senator Sam Ervin* (No. 3).

General Services Administration, Office of the Federal Register and National Archives and Records Service, *The United States Government Manual 1984/85* (No. 5).

Goldblat, Jozef, Frank Blackby and Sverre Lodgaard, editors, *No First Use* (No. 1).

Johnson, James Turner, *Can Modern War Be Just?* (No. 4).

Lodgaard, Sverre, Frank Blackby and Jozef Goldblat, editors, *No First Use* (No. 1).

McDougall, Walter A. and Paul Seabury, editors, *The Grenada Papers* (No. 8).

National Archives and Records Service, Office of the Federal Register and General Services Administration, *The United States Government Manual 1984/85* (No. 5).

Office of the Federal Register, National Archives and Records Service and General Services Administration, *The United States Government Manual 1984/85* (No. 5).

Polmar, Norman, *The Ships and Aircraft of the U.S. Fleet* (13th ed.) (No. 6).

Schuck, Peter H., *Suing Government: Citizen Remedies for Official Wrongs* (No. 7).

Seabury, Paul and Walter A. McDougall, editors, *The Grenada Papers* (No. 8).

Sinclair, Ian, *The Vienna Convention on the Law of Treaties* (2d ed.) No. 9).

Sinnott, John P., *A Practical Guide to Document Authentication: Legalization of Notarized and Certified Documents* (No. 10).

III. TITLES NOTED

Can Modern War be Just?, *by James Turner Johnson* (No. 4).

Grenada Papers, The, *edited by Paul Seabury and Walter A. McDougall* (No. 8).

Guide to Merit Systems Protection Board Law and Practice, A, *by Peter B. Broida* (No. 2).

No First Use, *edited by Frank Blackby, Jozef Goldblat and Sverre Lodgaard* (No. 1).

Practical Guide to Document Authentication: Legalization of Notarized and Certified Documents, A, *by Peter P. Sinnott* (No. 10).

Preserving the Constitution: The Autobiography of Senator Sam Ervin, *by Sam J. Ervin, Jr.* (No. 3).

Ships and Aircraft of the U.S. Fleet, The, *by Norman Polmar* (No. 6).

Suing Government: Citizen Remedies for Official Wrongs, *by Peter H. Schuck* (No. 7).

United States Government Manual 1984/84, The, *by the Office of the Federal Register, National Archives and Records Service and General Services Administration* (No. 5).

Vienna Convention on the Law of Treaties, The, (2d ed.), *by Ian Sinclair* (No. 9).

1. Blackby, Frank, Jozef Goldblat, and Sverre Lodgaard (eds.), *No First Use*. Philadelphia, Pennsylvania: Taylor & Francis Inc., 1984. Pages: ix, 151. Appendices, Index. Publisher's address: Taylor & Francis Inc., 242 Cherry Street, Philadelphia, Pennsylvania 19106-1906.

The subject of nuclear arms control is seldom distant from the front page of any daily tabloid. Efforts to curb, or eventually eliminate, these weapons of unprecedented destructive capacity from the face of the earth have continued, with various degrees of sincerity and enthusiasm, since the years of Presidents Eisenhower and Kennedy. Among the more recent proposals in the area of arms control negotiation has been the concept of a pledge of "no first use" of nuclear weapons, *i.e.*, that the pledging nation would not be the first to resort to nuclear arms in an otherwise conventional confrontation. This policy of no first use is anathema to the three-decade-old strategy of the North Atlantic Treaty Organization (NATO) that offered a "flexible response" to Warsaw Pact aggression in Europe, a respone that would permit, should conventional means fail, the use of nuclear weapons in self-defense.

Among the superpowers, the Soviet Union, in 1982, and the People's Republic of China, even before acquisition of nuclear weapons, have made a pledge of no first use. In deference to the overwhelming Warsaw Pact conventional superiority in Europe, however, the United States had not and was not seriously prompted to make such a pledge until 1982. In that year, in addition to the Soviet pledge, an article was authored by four prominent former American cabinet officers and statesmen—Robert McNamara, McGeorge Bundy, George F. Kennan, and Gerard Smith—which advocated a no first use pledge by the United States.

In *No First Use*, several papers compiled under the auspieces of the Stockholm International Peace Research Institute assess the various advantages, disadvantages, and practical difficulties with such a pledge by the United States. The McNamara, Bundy, Kennan, and Smith article is reprinted and several other perspectives from both supporters and opponents of no first use are provided. Among

the alternatives proposed and defended (or attacked) are a pure pledge of no first use, a continued first use option, a no first use pledge together with a stronger conventional defense or additional confidence building measures or both, a non-early use of nuclear weapons pledge, perhaps accompanied by a "nuclear free zone" in potential forward battle areas, or no first use in connection with conventional arms control measures. *No First Use* provides a valuable insight to the reader and highlights that the issue is not as simplistic as either the peace activists or no first use opponents would have the public believe.

2. Broida, Peter B., *A Guide to Merit Systems Protection Board Law and Practice.* Washington, D.C.: Dewey Publications, Inc., 1984. Pages: 485. Price: $52.00 (paperbound).

There are very few, if any, comprehensive works on anything anymore. If, however, you are looking for something close to it, read this work on Merit Systems Protection Board practice. It is an exceptional study of the history, the jurisdiction, and a subject-by-subject analysis of personnel law and practice. It is comprehensive, clear, concise and ever so easy to read—an anomaly in the law. Certainly, there are some shortcomings in it, but they are not so serious as to mar its usefulness.

For the lawyer, the book is flawed by the absence of a topical index and a table of cases. In MSPB practice, however, there are so few really notable cases that this void is not as serious as it seems at first. What is notable is the technique used by the author to bring the lawyer and management employee relations professional along. He uses the words of the Merit Systems Protection Board (MSPB) judges to paint its legislative history and to include or exclude persons or subjects at will. These "Judges" tell the a story of how this new statutory creature was born on Friday the 13th of October 1978 and has grown into a respected adult institution virtually on its own since its effective date of 11 January 1979. Indeed, the Court of Appeals for the Federal Circuit has affirmed the Board's view of itself time and again and the author demonstrates this in his final chapter by making clear the limited scope of that court's review. Indeed, he shows that the standards for decision making are very narrow and accord considerable deference to the administrative determinations of the MSPB. That court has only reversed when the MSPB findings have been "totally unwarranted," "so excessive," "so harsh," or "so eminently out of accord with applicable law" as to require it. In the main, teh author paints a convincing picture of a good body of emerging case law standing unreversed.

The best chapters are those that the author devotes to evidence, adverse actions, nexus, and mitigation; the substantive offenses chapter is so well-done as to be ranked with them. The performance cases are well-researched and carefully compared to the misconduct cases. This is followed by an exceptional treatment of discrimination issues and how to handle mixed cases; harmful error is right up there with them.

Lawyers, of course, are always interested in the issue of attorneys' fees and what is required for the agency to award them. Reasonableness is a significant part of this equation if the parties have addressed the issues of "prevailing party" and "interest of justice." The "how to collect," by knowing where to file what papers, is one of the easiest to follow formats in print—even easier to assemble than a Christmas toy.

The book would be improved if the author added a table of cases and a subject matter index. These two items would encourage far greater use of this work than it will without them. Apart from these deficiencies, however, the practice will probably flourish with this new basic resource. The case law in this area of the practice is increasing at a phenominal rate. Because of it, the author promises to republish each year, rather than add pocket parts as others do. Whatever he does, though, he deserves a great vote of thanks for advancing the state-of-the-art. It is a fine contribution to the existing literature and the practitioners will welcome it.

*This Publication Note was prepared by Colonel Robert M. Nutt, JAGC (Ret.), formerly Chief, Labor and Civilian Personnel Office, Office of The Judge Advocate General, U.S. Army.

3. Ervin, Sam J., Jr., *Preserving the Constitution: The Autobiography of Senator Sam Ervin.* Charlottesville, Virginia: The Michie Company, 1984. Pages: xiv, 436. Appendices, Name Index, Subject Index. Price: $19.95. Publisher's address: The Michie Company, 1 Town Hall Square, Charlottesville, Virginia 22901.

Even a decade after his retirement from the Senate, the mention of the name of Senator Sam Ervin will provoke a response from students of the 1960s and 1970s. To students of the 1960s, he was an opponent of the major decisions of the Warren Court respecting the rights of minorities and the accused. To students of the 1970s, he was the "country lawyer" who chaired the Senate Watergate Committee's investigation of the Watergate break-in and the related mis-

deeds of the Nixon Administration. As goes the phrase "what have you done for me recently," the historical picture of Sam Ervin will likely focus upon his chairmanship of that Committee during the spring, summer, and autumn months of 1973.

His autobiography is one that most people might like to write. Titled *Preserving the Constitution*, Senator Ervin broaches more topics than constitutional jurisprudence. He tells us about himself, his family, his military, judicial, and congressional exploits, and, for the bulk of the book, about his views concerning topics from the proper role of the judiciary, to school prayer, to, not surprisingly, the Watergate affair.

Some of the material contained herein may upset the students of history who remember Senator Ervin only as the Watergate Committee Chairman who seemed devoted to safeguarding individual liberties against an overreaching Executive Branch of government. Indeed, many of the Supreme Court decisions that have been seen by those same students of history as performing a similar role are lambasted by Senator Ervin as "judicial abberations" and are discussed in a chapter of that name. For example, among the judicial abberations listed are *Miranda v. Arizona*, *Roe v. Wade*, *Furman v. Georgia*, and virtually every major Supreme Court interpretation of *Brown v. Board of Education*. Indeed, Senator Ervin spends several pages in an *apologia* concerning his initial strong criticism of *Brown* and his subsequent conversion to its wisdom.

The Watergate chapter of the book is mercifully short, with the author explicitly limiting himself to the crucial periods and events in question; Senator Ervin has already written a detailed book on the Watergate affairs. Rather, the thrust of this book is to reveal the philosophy of Sam Ervin on the Constitution and to demonstrate how he would, or had, applied that philosophy to concrete issues that arose in Congress and the courts. While one may not always agree with Senator Ervin, this book provides a detailed argument for each position he has espoused.

4. Johnson, James Turner, *Can Modern War Be Just?* New Haven, Connecticut: Yale University Press, 1984. Pages: xi, 215. Notes, Select Bibliography, Index. Price: $17.95. Publisher's address: Yale University Press, 92A Yale Station, New Haven, Connecticut 06520.

The concept of *jus in bello*, that there are limits to how a war may be waged, traces its roots to the teachings of St. Augustine. To Augustine, a party or state attacked may resort to whatever means are proportionate to the attack in asserting self-defense. Escalation

becomes the responsibility of the attacker, not the victim. Since Augustine's time, the concept of restraint in war has become secularized and today finds itself deeply imbedded in the doctrines of necessity and proportionality.

In *Can Modern War Be Just?*, James Turner Johnson, a Professor in the Department of Religion and the Graduate Department of Political Science at Rutgers University, discusses whether the concept of *jus in bello*, as well as the traditional respect for the rights of noncombatants, can effectively function in a world of nuclear weapons. Studying the concepts from the points of view of the nature of contemporary confrontations—superpower nuclear conflict, conflicts involving tactical nuclear weapons, conventional warfare, insurgency, and terrorism—and of the weaponry that may potentially be used on the modern battlefield, Professor Johnson renders some tentative judgments concerning the utility of the "just war" doctrine today. Finally, modern tactics, strategic planning, individual decisions on the morality of war, and the issue of whether unlimited means of warfare should ever be allowed are examined in the closing chapters.

Professor Johnson's thoughts are sure to provoke discussion concerning the moral permissibility of the various types of modern warfare.

5. Office of the Federal Register, National Archives and Records Service, & General Services Administration, *The United States Government Manual 1984/85*. Washington, D.C.: U.S. Government Printing Office, 1984. Pages: vii, 913. Name Index, Subject/Agency Index, Recent Changes. Price: $12.00 (paperbound). Publisher's address: Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402.

Larger than its immediate predecessor, *The United States Government Manual 1984/85* is a valuable tool with which to find one's way through the seemingly impenetrable maze of the federal government. Organized by branch of government, this book provides a directory, by name, address, and function of each governmental agency.

The branch of government with which the average citizen would most likely come in contact, the executive, is dissected for ease of research. Each component agency is described and its mission analyzed to inform the reader of the identity of the persons perhaps responsible for regulation of their lives or businesses. A special feature is each agency's "Sources of Information" section, which

provides addresses and telephone numbers for locating specific information about employment, government contracts, and publications, films, and services available to the general public.

A useful tool with which to attain access to the federal government, the *Manual* is a valuable asset to the library of any government attorney.

6. Polmar, Norman, *The Ships and Aircraft of the U.S. Fleet* (13th ed.). Annapolis, Maryland: The Naval Institute Press, 1984. Pages: xi, 559. Ship Name and Class Index, Ship Designation Index, Addenda. Price: $29.95. Publisher's address: The Naval Institute Press, Annapolis, Maryland 21402.

The successor issue of a series begun in 1939, this informative and comprehensive review of the United States naval forces describes the state of the sea and air fleet at a time of an unprecedented peacetime naval expansion. In this volume, Norman Polmar, an author who specializes in United States and Soviet naval issues, discusses several new classes of ships, as well as the state of the Rapid Deployment Joint Task Force. Surveying the current state and pace of naval expansion, Mr. Polmar predicts that the projected 600 ship Navy will in fact grow in excess of a 700 ship Navy by the end of the decade. The ability of the government to man and maintain a fleet of this size, however, is closely questioned.

Butressed by over 800 photographs and line drawings, this volume is an indispensible key to an understanding of American naval sea and air capabilities.

7. Schuck, Peter H., *Suing Government: Citizen Remedies for Official Wrongs*. New Haven, Connecticut: Yale University Press, 1983. Pages: xxi, 262. Appendices, Notes, Index. Price: $25.00 (paperbound). Publisher's address: Yale University Press, 92A Yale Station, New Haven, Connecticut 06520.

As noted in the Introduction to the book, Justice Louis Brandeis once wrote: "Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Official wrongdoing, whether invidiously intentional or guidelessly negligent, takes place at the myriad levels of the federal government today. The very complexity of the government and the investiture of "street-level bureaucrat" with the authority to profoundly impact upon the lives of individuals are developments that themselves tend to promote at least the resentment in the "wronged" individual that may later result in a lawsuit against the federal government.

In *Suing the Government: Citizen Remedies for Official Wrongs*, Peter H. Schuck, Professor of Law at Yale University, examines the causes of misconduct on the part of the "street-level bureaucrat" and evaluates the various modes for redress available to the individual. Focusing on civil remedies under federal law, thereby excluding all state and federal criminal avenues of redress, the author studies the range of damage remedies against the government and concludes that an expansion of those remedies is necessary. The practical problem of mobilizing the bureaucracy to accept such reforms is addressed and the role of the courts in this process is specifically highlighted. In the Appendices, figures concerning the volume of litigation against public officials are presented and thumbnail sketches of the existing state of federal and state immunity for officials is provided.

8. Seabury, Paul and Walter A. McDougall (eds.). *The Grenada Papers*. San Francisco, California: ICS Press, 1984. Pagex: xvii, 346. Glossary. Price: $16.95 (hardbound), $8.95 (paperbound). Publisher's address: ICS Press, Institute for Contemporary Studies, 785 Market Street, Suite 750, San Francisco, California 94103.

Americans have always—and particularly since the Vietnam War—maintained a certain distrust for information provided them by all levels of government. Accordingly, when United States and Caribbean forces stormed the island of Grenada in October 1983, the proffered justifications for the action and information provided concerning the aims and nature of the Grenadian government was met with skepticismi in the media, in the halls of Congress, and in allied capitals. Public perceptions were not aided by the exclusion from the battle zone of members of the press corps during teh initial days of the incursion.

In *The Grenada Papers*, however, much of the skepticism about what the government had put forward will be dispelled. Documents captured by the occupying forces and recently released reveal a complex web of alliances and treaties between the Marxist government of Grenada and the Soviet Union, Cuba, Bulgaria, East Germany, Czechoslovakia, and North Korea. The documents provide the first modern-day glipmse behind the operational facade of a Marxist government and provide the additional benefit of seeing the original documents in the English language, free of potential dialectic variation by an interpreter.

Several documents are immensely instructive. Following the most recent doctrinal example of the transition from the moderate to radical transformation of the Sandinista regime in Nicaragua, Gre-

nadian Prime Minister Maurice Bishop, in a lengthy speech to New Jewel Party members in September 1982, explained the necessity of, at first, including moderate "upper pretty-bourgeoisie" elements in the ruling coalition, "so that imperialism won't get too excited and would say 'well they have some nice fellas in that thing; everything alright,' and as a result wouldn't think about sending in the troops." Ultimate control, however, was maintained by the Marxist cadre and the moderate elements were either jailed or forced into resignation from the government and exile.

Treaties and protocols are reproduced in this volume, as are letters, speeches, and memoranda, many of which were labelled "Top Secret," and describe the attitude of the government towards the domestic political situation, the churches, propaganda and relations with the United States, and relationships between Grenada and the Soviet Bloc and the Socialist International. Finally, one may read the documents and messages that accompanied the downfall of the Bishop regime and the decent into anarchy of the island.

Paul Seabury is a Professor of Political Science and Walter McDougall is an Associate Professor of Diplomatic History at the University of California, Berkeley.

9. Sinclair, Ian, *The Vienna Convention on the Law Of Treaties* (2d ed.). Dover, New Hampshire: Manchester University Press, 1984. Pages: x, 270. Articles of the Convention Cited in the Text, Cases Cited in the Text, Index. Price: $40.00. Publisher's address: Manchester University Press, 51 Washington Street, Dover, New Hampshire 03820.

A treaty on treaties? As unlikely a prospect as that may seem, it is an accurate description of the Vienna Convention on the Law of Treaties of 1969. The Convention tackles the relationship between treaty and custom in international law and provides the reader with various judicial interpretations of the more common problems in treaty interpretation and implementation.

Following an introduction that outlines the general background and purposes of the Vienna Convention, the book focuses upon the conclusion and entry into force of treaties; reservations to treaties, including the most recent jurisprudence on the topic; the observance, application, amendment, and modification of treaties, to include the effect, if any, of treaties on third states; the Convention rules for the interpretation of treaties; the invalidity, termination, and suspension of operation of treaties; and *jus cogens* and the settlement of disputes. In a final chapter, the author discusses the

significance of the Convention and its probable effect upon international treaty law.

The Vienna Convention of the Law of Treaties is the latest in a series of Melland Schill monographs in international law published by the Manchester University Press.

10. Sinnott, John P., *A Practical Guide to Document Authentication: Legalization of Notarized and Certified Documents.* Dobbs Ferry, New York: Oceana Publications, Inc., 1984. Pages: xiii, 457. Price: $100.00 (looseleaf). Publisher's address: Oceana Publications, Inc., Dobbs Ferry, New York 10522.

With the worldwide stationing of United States forces, it is not uncommon for a legal assistance officer to advise a client that particular document necessary to a given transcation must be obtained and that the document must be notarized or certified by the local, perhaps foreign, authorities. Similarly, a service member who is about to be sent overseas may want to obtain in the United States a certification or notarization that may serve him well in the nation to which he is about to travel. Accurate advice in such cases will require at least a summary knowledge of the certification and notarization requirements of many nations of the world.

In *A Practical Guide to Document Authentication: Legalization of Notarized and Certified Documents*, the author has undertaken to summarize the notarization and certification procedures of several nations of the world and of each state of the United States. In addition, a discussion is provided of the procedures of the U.S. Department of State's Authentication Office, of the U.S. Arab Chamber of Commerce, and of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. An annual service will be offered to maintain the currency of the information provided in the book.

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

DONALD J. DELANDRO
Brigadier General, United States Army
The Adjutant General

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